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Received **MAY 16 1907**

ORANGE RIVER COLONY
LAW REPORTS.

HIGH COURT.

1905.

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ORANGE RIVER COLONY LAW REPORTS.

Reports of Cases

DECIDED IN THE

HIGH COURT.

1905.

REPORTED BY

S. J. DE JAGER, B.A., LL.B. (CANTAB.),
BARRISTER-AT-LAW OF THE MIDDLE TEMPLE, AND ADVOCATE
OF THE HIGH COURT OF THE ORANGE RIVER COLONY.

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TABLE OF ABBREVIATIONS.

S.C.....	Supreme Court Reports, Cape Colony.
C.T.R.....	Cape Times' Reports.
N.L.R.....	Natal Law Reports.
H.C.G.	High Court of Griqualand Reports.
E.D.C.....	Eastern Districts' Court Reports.
C.L.J.	Cape Law Journal.
S.A.L.J.	South African Law Journal.
Sth. Afr. Rep....	Reports of the High Court of the South African Republic.
Off. Rep.....	Official Reports of the High Court of the South African Republic.
Buch.....	Buchanan's Reports.
Menz. or M.....	Menzies' Reports.
Searle.....	Searle's Reports.
Kotzé	Kotzé's Transvaal Reports.
[1902] T.S.	Supreme Court, Transvaal Reports (1902 and onwards).
[1902] T.H.....	Witwatersrand High Court, Transvaal (1902 and onwards).
[1903] O.R.C....	High Court Reports, Orange River Colony (1903 and onwards).
T.L.R.....	Times' Law Reports.
L.T.R.....	Law Times' Reports.
[1891] A.C.....	Law Reports, Appeal Cases (1891 and onwards).
[1891] Q.B.....	Law Reports, Queen's Bench (1891 and onwards).
[1891] Ch.	Law Reports, Chancery (1891 and onwards).
L.J., P.C.....	Law Journal Reports, Privy Council.
L.J., Q.B.....	Law Journal Reports, Queen's Bench.
L.J., Ch.....	Law Journal Reports, Chancery.

Judges:

**THE HON. SIR ANDRIES MAASDORP, CHIEF
JUSTICE.**

**THE HON. ARCHIBALD W. FAWKES, FIRST
PUISNE JUDGE.**

**THE HON. DANIEL WARD, LL.D., SECOND PUISNE
JUDGE.**



Attorney-General:

THE HON. HERBERT F. BLAINE, K.C.

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1905.

ADVOCATE.

Admission.—K, an English barrister, an advocate of the Supreme Court of the Cape Colony and of the High Court of the South African Republic, and thus entitled to admission as an advocate in the Orange River Colony, was convicted in England of an attempt to solicit to commit the crime of murder in respect of a person resident in the Transvaal, and served his sentence of imprisonment. As a consequence of his conviction K was disbarred by the benchers of his Inn in England. No action was, however, taken in the Cape Colony, and he remained an advocate of the Supreme Court there. On the 20th January, 1905, the benchers rejected his petition for reinstatement. K then applied to the Supreme Court of the Transvaal for admission as an advocate, which application was granted on the 8th May, 1905. He now applied for admission as an advocate of the High Court of the Orange River Colony, alleging that his aforementioned offence was of a political nature. *Held*, that the presumption was that a person convicted of a crime is unfit for admission as an advocate, but that this presumption may be removed by the circumstances which led to the crime, and that the Court in exercising its discretion would consider chiefly the facts disclosed at the trial and their bearing on the man's moral character. Upon the facts of the case, the Court granted the application. *Ex parte Krause.* 82

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ANTENUPTIAL CONTRACT.

Signed under power of attorney and subsequent to marriage—Registration.—S, a resident in the O.R.C., proceeded to van Rynsdorp, Cape Colony, for the purpose of being married. The parties desired to enter into an antenuptial contract, but as there was no practising attorney or law agent in van Rynsdorp, they executed a power of attorney to enable the contract to be signed before a notary public in Capetown. S was aware that owing to the postal arrangements the power of attorney could not reach Capetown before the solemnization of the intended marriage, and therefore, on the 30th December, 1903, just prior to the marriage, the parties executed an antenuptial contract before the Acting Resident Magistrate at van Rynsdorp. The antenuptial contract was completed at Capetown under the power of attorney on the 6th January, 1904, and registered on the 8th January, 1904. S now applied for an order authorising the Registrar of Deeds of the Orange River Colony to register both the said antenuptial contracts. *Held*, that such an order issue in regard to the contract signed at Capetown, saving the rights of creditors in respect to debts contracted after the marriage, but before the date of registration. *Ex parte Steyn.* 48

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Masters and servants—Minor servant—Ordinance 7 of 1904, sec. 37.—In order to render a minor criminally liable under sec. 37 of Ordinance 7 of 1904, it must be proved that the contract of service was to the benefit of the minor. When criminal proceedings are taken against minors under the Masters and Servants Ordinance, full particulars should appear on the record as to (1) the exact terms of the contract of service, (2) the mental development of the accused, and (3) whether the rate of wages was that generally paid for work of the same description in the locality. *Nchakha v. Rex.* 58

Trespass—Law 11 of 1899, sec. 1.—The expression “private property” in Law 12 of 1899, is used in contradistinction to property to which the public have a common right of user; consequently the property of the Crown, which is not subject to such a right of user, falls within the meaning of the term. A person found in a hut in a native location on Crown land is not liable to a prosecution under Law 11 of 1899 simply because he has not obtained permission from the Native Commissioner. *Rex v. Lapierre and Another.* 61

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Registration.—A donation *inter vivos* exceeding £500 in value and which is accepted by the donee is valid as between the parties although not registered. *Semble*, the registration of donations over £500 in value is unnecessary, even as regards creditors, where there has been transfer of the immovables or an open and *bond fide* delivery of the movables, the subject of the gifts. *Wiese, N.O., v. Executors of Wiese.* 130

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HOUSE-BREAKING.

See CRIMINAL PROCEDURE.

HUSBAND AND WIFE.

See ANTENUPTIAL CONTRACT.

Divorce—Adultery—Connivance.—Plaintiff and defendant, who were man and wife, lived in a single room. On the 7th May,

1904, defendant went out in the evening and returned a few hours later with two strange men. On entering the room with the strangers, she rebuked plaintiff for being always at home and suggested that he should go out and play billiards. Plaintiff left the room, entered the adjoining room and in the company of two other persons watched, through holes and cracks in a wooden partition, what was taking place. Adultery having been proved the Court raised the question whether plaintiff had not connived at the adultery. *Held* (WARD, J., dissenting), that plaintiff by his act in leaving the bedroom, deliberately made an opportunity, intending that adultery should be committed, and in consequence he was not entitled to a decree of divorce. *Coetzee v. Coetzee*. 65

Divorce—Domicile.—The parties were married at Glasgow, Scotland, in 1897; they lived in London until 1898 when plaintiff came to South Africa and in 1904 took up his residence in the Orange River Colony. In October, 1904, plaintiff sent his wife, the defendant, £25 to enable her to rejoin him; she refused to rejoin him and applied the money to other purposes. Plaintiff had accepted a permanent appointment as bookkeeper in a business in Kroonstad; he further stated in an affidavit that it was his intention to remain in the colony. Affidavits were filed showing that he had identified himself with a certain church in Kroonstad and was also secretary to a local syndicate. In an application for leave to sue defendant by edict for restitution of conjugal rights, failing which for divorce on the ground of malicious desertion; *Held*, that the application must be refused as the Court was not satisfied that plaintiff had acquired a domicile in the Orange River Colony. *Andrew v. Andrew*. 40

Domicile—Divorce.—A wife sued her husband for restitution of conjugal rights, failing which for divorce, on the ground of malicious desertion. The husband had been sued edictally but did not appear, and his whereabouts were unknown. It appeared that his domicile of origin was the Cape Colony, but he had lived for a little while both before and after the war in this colony. *Held*, that he had not acquired any domicile here and consequently the wife was not entitled to bring her action in this Court. *Parker v. Parker*. 73

INSURANCE.

Previous fire—Question in proposal form—Answer written down by the agent for the insurer.—The proposal form for an insurance signed by B and which was presented to him by C, the agent for M, the assurance company, answered in the negative a question therein proposed by M as to whether B had ever had any loss by fire, either in the premises containing the merchandise insured or elsewhere, and, if so, to state particulars. The policy made the proposal a part and the basis of the contract of assurance and a warranty on the part of the applicant, and provided that any misstate-

ment of, or omission to state any fact material to be known for estimating the risk, would render the policy void as to the property affected by such misstatement or omission. As a fact B had previously had a fire in the Transvaal. The proposal form had been drawn up and filled in by C and, so B alleged, without B's authority and without C asking him for any information. It appeared in evidence that a year previously B had applied to M for another policy, and on the proposal form had answered the same question in the negative. B admitted that if he had had to fill in the proposal form in this case himself he would still have answered the question in the negative. The Court found as a fact that the proposal form was filled in by C at the request or at any rate with the consent of B, and that the information contained in the answers was communicated by B to C. *Held*, that the policy was void. *Boyd v. Manchester Assurance Company.* 26

INTERPRETATION.

See POWER OF ATTORNEY.

See WILLS.

LAND.

Transfer duty—Exemption—Chapter 67 of the Law Book, secs. 20 and 21—Mutual Will.—Where the survivor of spouses married in community of property, who was entitled under the mutual will to a life usufruct of certain property bequeathed to the children, desired to pass transfer of the property in full ownership to the children, *Held*, that transfer duty must be paid; neither sec. 20 nor sec. 21 of the Transfer Duty Act, chapter 67 of the Law Book, which provide for exemption from transfer duty in certain cases, being applicable. *Ex parte Fick.* 50

Transfer duty—Exemption—Chapter 67 of the Law Book, sec. 24—Fideicommissum—Joint estate.—Certain fideicommissary heirs executed a notarial deed whereby they renounced in favour of the fiduciary heir, who had remarried in community of property, their rights to the farms burdened with *fideicommissum*, which farms had been registered in the name of the second husband of the fiduciary heir after the liquidation account in the estate had been filed. An application that such deed should be registered free from payment of transfer duty on the ground that same fell within the terms of sec. 24 of the Transfer Duty Act, chapter 67 of the Law Book, was refused. The joint estate mentioned in the said section of the Act refers to the estate before it has been distributed. *Ex parte Horak.* 53

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LEGACY.

See WILLS.

LIQUOR LAWS.

Uncorroborated evidence of trap.—C, a trap, while investigating alleged illegal sales of intoxicating liquor, met one D who introduced him to B. C stated that B supplied him with liquor for which he (C) paid; D, contradicting this, the Court *held* that it was unsafe to convict B on the uncorroborated evidence of a trap. *Brown v. Rex.*

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MAGISTRATE'S COURT.

Appeal—Reopening case.—H obtained judgment by default against Z in the magistrate's court. Z did not appear and no evidence was led. Z subsequently appealed. *Held*, that the appeal must be dismissed, as Z had not exhausted his remedies; his remedy being first to apply to the magistrate to reopen the case. *Zweiback v. Herbst.*

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MASTER AND SERVANT.

See CRIMINAL PROCEDURE.

MEDICAL.

Medical practitioner—Admission.—R, who held the necessary qualification for admission as a medical practitioner under chapter 97 of the Law Book, was admitted by the Military Governor to practise as a medical practitioner in 1900. He took out a license and practised, but owing to warlike operations he was obliged to leave the town where he had been practising. He returned in 1903 and applied to the Medical Officer of Health to be registered as a medical practitioner; his application having been refused by that officer he applied to the High Court. *Held*, that as plaintiff was entitled to be admitted under chapter 97 and had submitted his certificates to the authorities in 1900, the presumption was that his admission by the Military Governor was under the civil law and not under martial law, as was contended by the Medical Officer of Health. The application was granted. *Ex parte Rediker.* 46

MINORS.

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MUNICIPALITY.

Expropriation — Ordinance 21 of 1904 — Law 1 of 1899—Proclamation 11 of 1902.—By Ordinance 21 of 1904 the defendants were empowered, subject to payment of compensation, to expropriate land or any rights in respect thereof in Bloemfontein for the purpose of carrying out the works necessary for or incidental to the widening, straightening and bridging of the watercourse running through the city. Defendants accordingly expropriated certain portion of an erf belonging to plaintiffs. Plaintiffs claimed that a larger portion had been expropriated than was necessary for the proposed works, and prayed for the expropriation to be set aside and for an interdict restraining defendants from interfering further with their land, and damages. The city engineer in his evidence stated that the expropriation was absolutely necessary. *Held*, that the Court was bound to give effect to the clear meaning of the Ordinance. That

unless plaintiffs could show that the city engineer's evidence was not given as a *bond fide* opinion and that the land was in reality not required, they could not succeed. Judgment was given for defendants. *Humphries & Lammas v. Town Council of Bloemfontein.* 90

NEGLIGENCE.

Law agent—Damages.—B, a law agent, sued T in the magistrate's court for £2, 12s. 3d., for professional services rendered. T admitted liability but counterclaimed £20 in respect of a military receipt for the amount and of the value of £30—but which was reduced to bring the matter within the jurisdiction of the magistrate. The receipt had been given to T by an English officer on the 26th January, 1903, in respect of a horse, saddle and bridle with which, nearly two years previously, he had surrendered to the British during the late war. On the 27th January T handed the receipt to B to be sent to the Staff Officer of Receipts at Harrismith in support of a claim. B alleged that he wrote a letter on the 29th January forwarding the receipt, and produced a press copy of the letter. The letter however was unregistered and the military authorities stated that they never received the same. B did not keep a copy of the receipt. The magistrate found that B had acted negligently and gave judgment against him for the £20. *Held*, on appeal, that the facts did not disclose negligence on the part of B and that the magistrate's decision must be reversed. *Bukes v. Theron.* 77

ORDINANCES.

Ordinance 7 of 1904, sec. 37.	<i>See Nchakha v. Rex.</i>	58
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POWER OF ATTORNEY.

See ANTENUPTIAL CONTRACT.

Proceeding to final end and determination—Interpre-

tation.—M had granted a power of attorney to defend the action in the magistrate's court, under which his attorney was authorised to proceed to the final end and determination of the matter. The Court was of opinion that such a power did not grant the attorney authority to give notice of, and prosecute an appeal from the magistrate's decision, but under the special circumstances of the case the appeal was allowed to proceed. This was not, however, to form a precedent. *McHardy v. Olifant*. 42

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See PURCHASE AND SALE.

See WILLS.

PROCLAMATIONS.

Proclamation 11 of 1902. *See Humphries and Lammas v. Town Council of Bloemfontein*. 90

PURCHASE AND SALE.

Resolutive and suspensive condition.—O sold a horse to C for £19, of which £6 was paid on account. C gave O a document agreeing to pay the balance of £13 in two monthly instalments of £6, 10s. each. C sold the horse to M without having paid any further amount. O sued M for return of the horse alleging that by verbal agreement the sale to C had been made subject to a suspensive condition. The magistrate gave judgment in favour of O, holding that the suspensive condition had been proved. On appeal, *Held*, that on

the records the magistrate's finding was wrong ; that the condition was a resolute one and that therefore the property in the horse had passed to C and from him to M. The presumption must be in favour of a resolute rather than a suspensive condition. *McHardy v. Olifant*.

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Warranty — Actio redhibitoria — Acceptance — Actio quanti minoris.—T advertised two motor cars for sale, guaranteeing them in good condition. On the 24th December, 1904, D, relying on the guarantee, bought one of the cars for £125. The same afternoon T took D out in the car to explain its working. The car did not work satisfactorily, but T explained that this was due to the petrol being very old. On the 29th December D complained further about the car to T, who then said the fault lay in the carburettor, which he attended to. On this occasion D paid T £45 and gave him a post-dated cheque for £80, the balance of the purchase-price. The car gave more trouble, and in the beginning of January, 1905, when D went to Dewetsdorp in the car, he experienced a great deal of difficulty with it. On his return he examined the car thoroughly and discovered a serious defect in the gear-box. He then took the car to a repair shop and had a new gear wheel put in. When the post-dated cheque fell due T on presenting same found that payment had been stopped. He now sued D on the cheque. D pleaded that the car did not answer to the guarantee owing to a number of serious defects which rendered the car of no value to him ; he therefore claimed that the sale should be rescinded and the part purchase-price already paid by him refunded. The Court found that at the time of the sale there were at least two defects in the gear-box, for either of which D would have been entitled to repudiate the contract. *Held*, that upon discovering the one defect D was put upon examination, and before effecting any repairs should have thoroughly inspected the car. That, by having the new gear wheel put in, D had accepted the car subject to all defects and could therefore not succeed in the *actio redhibitoria*. *Held*, further, that the *actio quanti minoris* was nevertheless still open to D, who could therefore claim that the purchase-price be diminished, in so far as the car was at the time of the sale, owing to latent defects, of less value than it was represented to be. *Truter v. Dunn*.

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REGISTRATION.

See ANTENUPTIAL CONTRACT.

See DONATION.

SERVITUDES.

Common fountain—Right to water—Diverting flow of water.—Where a fountain was situated on the common boundary of two farms, some of the “eyes” or sources being situated on one side of the line and some on the other, but the water being collected in one common pool extending on both sides of the line, and such water had throughout been used in common by the owners of the farms; *Held* (WARD J., dissenting), that such fountain was a common fountain, and that the owner of one of the farms was not entitled to divert the water from the fountain by digging a well and erecting a pump in close proximity. Per MAASDORP, C.J.: Whenever a fountain is situated directly on the boundary line of two properties, it will generally be presumed to be common property; it being a principal of universal application to walls, ditches and passages, running along a common boundary line between two properties, that where their origin is lost in the past they must be regarded as common until the contrary is proved. *de Bruijn v. Louw.* 11

Water, right to—Sinking of well—Diverting flow of water.—Where S had obtained from B's predecessor in title a duly registered servitude of half the water in a certain fountain on B's ground, together with the right to a water-furrow from the said fountain; *Held*, that B was not entitled to sink a well close by the fountain and pump therefrom for his own use, thereby diminishing the flow of water in the fountain. WARD, J., dissented on the facts. *Snijman v. Boshoff.* 1

TRANSFER DUTY.

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TRESPASS.

See CRIMINAL PROCEDURE.

VINDICATIO.

See WAR.

WAR.

Enemy property—Appropriation.—A commanding officer who deals with enemy property in a way in which he would not have done unless he intended to appropriate it, must be presumed to have appropriated it. Such appropriation will also be presumed to be in accordance with the laws of war, unless the contrary be proved.
Claassens v. Wilkens. 139

WARRANTY.

See PURCHASE AND SALE.

WATER.

See SERVITUDES.

WELL.

See SERVITUDES (*Water*).

WILLS.

See LAND.

Alteration of—Power of Court.—An application by a sur-

viving spouse for leave to alter the distribution of property under the mutual will of himself and his pre-deceased spouse, refused. *Ex parte Joubert.* 75

Codicil — Interpretation — Presumption against fideicommissum — Legacy. — By mutual will, various farms were bequeathed to the children of the testators or their descendants by representation. Subsequently a codicil was added to the will, to the following effect: "Should it happen that a mine of any kind of precious stone, minerals or base metals be discovered on any of the farms herein beforementioned in our testament and bequeathed to our children, then the legacy concerning such farm or farms shall lapse, and such farm or farms shall be sold by public auction and the proceeds equally divided amongst all our children, and in the event of predecease, their lawful descendants. In this case, though otherwise not, we declare to bequeath as a legacy to the child or children, whose right to any legacy as aforementioned may have become void by the discovery of a mine as just mentioned, the farm Toeloop, our lawful property." *Held*, that the codicil did not impose any *fideicommissum*. The reasonable construction to be given to the wording of the codicil was that in the event of a mine being discovered on any of the farms bequeathed during the lifetime of the testators, and so before the will took effect, the legacy in respect of such farm should lapse. *Ex parte van der Merwe.* 21

Interpretation—Fideicommissum—Prohibition against alienation—Powers of Court. — By a clause in their mutual will the testators provided as follows: "And now proceeding to the election of heirs the testators declare to nominate and appoint as their sole and universal heirs their children procreated jointly out of this marriage or that might still be born, and at the predeceasing of one or more of them then their lawful descendants by representation, that is in all the goods to be left by the testators, nothing excepted, and especially their farm Bultfontein, district Rouxville, Orange Free State; under the express conditions, however, that the said heirs may not sell, lease, give in use or burden with hypothec or in any way alienate the immovable property to strangers which they shall inherit in this way; these conditions shall remain in force to the fourth degree; our heirs shall, however, have the right to sell to one another the immovable property to be inherited by them for not more, however, than £1 per morgen, and in that case the aforesaid conditions shall remain in existence." The heirs under the will made an application to the Court alleging that the said farm Bultfontein, which was the only asset in the estate, was of no pecuniary assistance to them on account of the small portion allotted to each, and that furthermore they were in very reduced circumstances; consequently they had agreed to sell the farm in order to obtain a certain amount of capital to carry on business, the *pro rata* share of the minor heirs to be paid to the Master of the High Court. The surviving spouse, who was entitled to a usufruct over the farm, also agreed to the sale, and was prepared to cancel her servitude of usufruct. *Held*, that the clause in the will was equivalent to a prohibition against the alienation of the farm out of the family and

therefore imposed a valid *fideicommissum* in regard to the property, and that the Court had no power to remove the restriction. *Ex parte van Heerden*. 34

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“Private property.”—*See Rex v. Lapierre and Another*. 61

REPORTS OF CASES
DECIDED IN THE
HIGH COURT
OF THE
ORANGE RIVER COLONY.

1905.

SNIJMAN v. BOSHOF.

1905. March 3. MAASDORP, C.J., and FAWKES and WARD, J.J.

Servitude.—Right to water.—Sinking of well.—Diverting flow of water.

Where S had obtained from B's predecessor in title a duly registered servitude of half the water in a certain fountain on B's ground, together with the right to a water-furrow from the said fountain ; *Held*, that B was not entitled to sink a well close by the fountain and pump water therefrom for his own use, thereby diminishing the flow of water in the fountain.

WARD, J., dissented on the facts.

In this case the plaintiff brought an action for declaration of rights to the free and undisturbed flow of water along a certain visible vein to a certain fountain on the farm Slangfontein, and for an order prohibiting the defendant or any one else from interrupting the natural flow of the said water, and enjoining her in so far as the same had already been interfered with to restore the same to its original course, or in default of such restoration to pay to plaintiff the sum of £1000 as compensation.

O.R.C. '05.

A

Plaintiff also claimed £500 as and for damages sustained through the wrongful interference with the said water.

In 1894 the plaintiff bought, and obtained transfer from the then owner of the farm Slangfontein, the portion thereof known as Vleyplaats, together with the right to the half of the water from the fountain at the time existing on that portion of Slangfontein not sold to plaintiff, and the right of constructing a water-furrow from the said fountain to defendant's farm Vleyplaats. The registered deed of transfer set out that the portion Vleyplaats was sold "with the right to the half of the water of the fountain at present existing on the homestead of Slangfontein, and the right of a water-furrow from the said fountain, as much as possible in a straight line to that portion surveyed under the name of Vleyplaats in favour of the said Isaac David Snijman or any other future owner or owners of Vleyplaats, with this stipulation that the water shall in future be so divided between the respective owners of Slangfontein and Vleyplaats that the owner of Slangfontein shall use that water the first eight days and the owner of Vleyplaats the following eight days and so on in turns for ever."

It was alleged that ever since the date of purchase plaintiff had used the water from the said fountain for his stock and for agricultural and domestic purposes on the farm Vleyplaats. In December, 1903, the defendant sank, or caused to be sunk, a well at a distance of about 80 yards from the eye or spring of the said fountain, and erected, or caused to be erected, a certain pumping apparatus by which the water from the said fountain was turned from its natural course and flow and appropriated by the defendant.

Plaintiff further alleged that the fountain was fed and supplied by a definite underground channel, clearly visible to the naked eye, upon the surface of the ground near the farm Slangfontein; and that owing to the interference with the free flow of the water to the fountain defendant had caused the fountain to cease to run and no longer to yield a sufficient supply, even for plaintiff's stock, in consequence whereof plaintiff had suffered £500 damages.

The defence set up was that the spring or fountain was not fed by any definite channel visible on the surface of the ground; the

plaintiff and defendant had used the water in turns, but for some years past the water had decreased from natural causes, in fact save during rainy seasons it had, since about the end of 1901, ceased to flow at all; in consequence whereof defendant caused a bore-hole in a well already existing on the farm Slangfontein and situate about one hundred and five yards away from the spring in question, to be further deepened, and the water to be raised therefrom by means of a windmill pump for use on the said farm; defendant alleged that plaintiff had assisted in putting up the windmill pump, and his stock had been allowed to drink of the water raised thereby. The further allegations in the declaration, that defendant had wrongfully and unlawfully turned the water from its natural course and flow, and that it was through the defendant's interference that the spring had ceased to yield a sufficient supply of water for plaintiff's stock, were specifically denied.

Plaintiff, in reply, admitted that during the last two years (during the dry season) the said fountain had ceased to overflow the basin at its open source, but said that until the sinking of the bore-hole and the pumping of the water from the same, the fountain yielded a copious supply of water for the watering of the cattle and domestic purposes generally.

Plaintiff further admitted having assisted in hoisting a certain part of the windmill pump, but said that he did not thereby waive any of his rights, and that subsequently he was allowed by defendant, as a matter of grace, to water his stock at the said pump for a while. Further, plaintiff had warned defendant at the time the bore-hole was being sunk that the bore-hole and pumping would injure him in his right of servitude.

Hertzog (with him *Borckenhagen*), for plaintiff: All the plaintiff had to prove was that the defendant interfered with the underground flow of water to the fountain. When a servitude is granted, everything is said to be granted without which the servitude cannot be exercised. See Voet, 8, 4, 16; Gale on *Easements*, 7th ed., p. 107; *Canham v. Fisk* (2 C. & J. 126); Angell on *Watercourses*, 7th ed., p. 242, secs. 141, 142, 143, 144, n. 1, 144, n. 2; Wodon, *Repertoire generale du droit des eaux et cours d'eaux*, p. 129,

sec. 3, Nos. 31-33 and 86; Gale on *Easements*, 7th ed., pp. 268, 269; *Taylor v. Corporation of St. Helen's* (L.R., 6 Ch. D. 264); *McNab v. Robertson* ([1897] A.C. 129); *Merlin Rep. Un.*, vol. 31, *sub voce* Servitude, 29, sec. 3; 4 *Holl. Cons., cons.* 377.

A. Fischer (with him *P. U. Fischer*), for defendant: The grant must be construed strictly. There had been no conclusive proof that percolations affected the supply to the fountain. The evidence for the defence may have been weak, but plaintiff's was weaker, and the onus rested upon him. See *Meyer and Others v. Johannesburg W. W. Co.* (Hertzog [Eng.] p. 10); *Struben and Others v. Cape District W. W. Co.* (9 S.C. 68).

WARD, J. (dissenting): In this case I have the misfortune to differ from my brothers on a question of fact. The case is one in which the plaintiff seeks damages and a declaration of rights on the ground that by sinking a well and erecting a pump the defendant has interfered with the plaintiff's rights. It is for the plaintiff to satisfy the Court beyond a reasonable doubt that an act of the defendant has been the cause of injury to him. Taking the evidence, it does not satisfy me that the defendant has interfered with the rights of the plaintiff. I need not go through all the evidence, and I may set aside that of the defendant.

The evidence for the plaintiff was as follows: Kotzee, the principal witness, gives evidence that on one occasion, I think in January, when he visited the fountain, the windmill pump was more or less working continuously; this was on a Saturday. At ten P.M. on Saturday he made certain marks. From these he found that the water had risen an inch. Then he went to defendant and asked her to stop the pump; it was stopped from six o'clock until twelve, and during this time it only rose one inch. I cannot think that the pump had any effect in that case. The water rose two inches in the night while the pump was working, and only one inch in six hours when the pump was stopped. I think there must be some other cause for the rising. Kotzee says that the water was dipped out, and he noticed that the water rose two inches in two minutes, but I think it impos-

sible that the rising could be attributed to the cessation of the pump. There must no doubt be another explanation. The other evidence does not carry the case further.

The rising and falling of the water, so far as the evidence goes, fails to convince me that the working of this pump is the cause of the failure of the water in the fountain. We know there has been drought and that wells have been failing since 1897 and springs have been giving out. The failure of the water may very well be attributed to the drought and not to the pumping from the well. The plaintiff must satisfy me beyond reasonable doubt that the pumping at the well is the cause of the failure. This he has failed to do, and, in my opinion, judgment should be for the defendant.

MAASDORP, C.J.: I am sorry that there should be a difference of opinion, but it is a question of evidence, and jurymen as well as doctors have a right to differ.

One cannot help thinking that the declaration was drawn under a misapprehension as to what the law was. The case entitled to have been put before the Court ought to have been much stronger. The evidence is weak, but my brother FAWKES and I think it sufficient.

Of the allegation in the declaration that there is an underground channel, and the law based on the existence of this channel, there is no evidence and it has been discarded. We must see therefore whether there are enough averments in the declaration upon which to found judgment.

As to the facts: In the declaration it is alleged that the plaintiff by the grant was entitled to a half-share in the stream, and that the defendant sunk a well and appropriated part of the water, and in consequence the water ceased to run. The averments seemed to me sufficient. Now what was the original position of the fountain before the division of the ground? There was a spring; whether it was artificially made or not is a matter of no importance. It was a private fountain to which the defendant had the right, as owner of the land, and might use it or abuse it or do what he pleased with it. He was in this position as regards the water out of the basin: he was

practically owner of the water, though as a matter of law it may not be so. This is as far as we can go. He had the right to the water coming out of the fountain, but he had not a right to it before it came out, *i.e.*, he could not prevent any one from interfering with the underground streams feeding the fountain.

There is an ironstone dyke under the fountain, and there are aqueous rocks from which the fountain is made. Sufficient scientific evidence has not been adduced in this case; the Court should have had more, because this is the first case of this nature which has come before this Court. I consider, however, that we have the right to conclude that the dyke acts as a dam, because we know that a dyke is as a rule impervious to water. As to the subsequent rise and fall of the level of the water inside the dyke, the water fell steadily as the drought went on, but there is a permanent supply held back by the dam of ironstone. Apparently this spring continued to run till about 1897. Mrs. Boshoff thinks the spring gave out to this extent, that it did not overflow. It had always run before that time and it ran again until about September, 1901, when it was running steadily. When the widow came back in 1903 it had stopped running, and since that time has never overflowed. This is no doubt attributable to the drought. But there always was a supply of water estimated at about two feet or eighteen inches in the bottom of the basin of the fountain, and there is sufficient evidence to bring us to the conclusion that that was the permanent level of the underground supply.

The evidence of what happened after the well was opened up by Stevens shows that the well had been originally made by Boshoff, in order that he might be able to lead the water to the surface, but that attempt failed. Plaintiff says that the water in the bore-holes never rose above the enlarged bore-holes, but he could see it standing in the bore-holes. Boshoff came to the conclusion that he could not lead the water off on to his lands, and plugged up the holes. Mrs. Boshoff stated that the water came into the bottom of the well, but we are not inclined to believe that. The question has been raised, why did the water not rise higher. We must consider the lie of the ground; the

excavation of the fountain was six feet and the well between seven and eight feet, showing a slight rise in the ground from the spring to the well. The water did not rise higher in the bore-holes because it had got to the level of the water in the spring.

Coming to the evidence of communication between the spring and the well, we have 1500 head of stock watered every evening from this spring until, Stevens says, the last few days before he moved the hand pump from the basin to the well, when there was a gradual diminution of the water, so that he used to water the cattle on the following morning instead of at night; 1100 sheep had been watered there on the evening before the pump was moved, and in the morning when he moved the pump, he watered his own stock: 400 sheep, 16 donkeys, 16 head of cattle and 2 horses. Evidently that morning when he moved the pump and after he had watered the stock, there was still water in the bottom of the basin, but he did not measure it. The plaintiff stated that as soon as the pump at the well began to work, the water at the fountain began to fall, and as soon as the windmill pump began it ceased altogether. This is very strong evidence of the connection between the spring and the well, namely, that the water which had been stationary for a long time should disappear as soon as the pump began working. The evidence of the so-called experts is unsatisfactory, but we must measure the comparative value of that evidence. As to the experts for the defendants, Kolver says he supposes that there is a connection. When the pump stopped for eleven days and he goes there specially asked by Stevens to make an examination; what does he do? One would have thought even a child would have gone to the spring and noted the level and condition generally there; but he does not go to the spring, because two days before, when he was at the farm, without any reference to the question arising, he had formed some idea as to the state of the water. He is satisfied with this and goes to the spring after eleven days, and, after observation, he says he could not notice that the water had risen at all in consequence of the pump being stopped.

As to my brother WARD's difficulty: At the end of the eleven days the water in the enlarged bore-hole was six or seven inches

deep when the pump was set working. Again Kolver says (speaking of the occasion of 19th February): "Before I came up here I had the pump working from twelve o'clock until four. Then I stopped the pump and went to see if the water would rise again, but it did not." Instead of taking measurements at twelve o'clock and at four he simply goes and sits down by the water, and tries to see with the naked eye if it would rise. I suppose there must still have been about six or seven inches, for he says: "I could see the water, but could not see it rise." The evidence of this witness is of no value, but for the fact that when the pump was stopped for thirteen days, there were six or seven inches in the basin, *i.e.*, the level of the permanent supply even after the drought of 1903. The evidence of Jacobs is also valueless as he failed to isolate the two factors of the situation. He went to look into the question, and as he was approaching the house he saw the pump working slowly; later on he went and put pieces of wood in the bore-hole on the level of the water, and still later he returns and finds the water at the same level, but all this time the pump was working slowly; so he does not prove that the one had nothing to do with the other.

Coming to the experts on the plaintiff's side: Kotzee's evidence might have been more valuable, but at any rate it takes us further than the evidence for the defence. On the 17th January he went to the farm at six P.M.; he found the water fifteen inches from the top of the basin and level with the bore-holes; the windmill pump was working at the time, and continued to work slowly during the night. On the following morning he went to the spring and found the water thirteen inches from the top of the enlarged bore-hole, *i.e.*, it had risen two inches in the night. This again establishes a connection, because the water was returning to the level Kolver had noticed, owing to the slow way in which the pump was working; for evidently the rate of supply was greater than the rate of abstraction. At six A.M. on the 18th he stopped the pump with the leave of Stevens, and it was left standing from six to twelve o'clock noon, by which time the water had increased by one inch. It is at this point where my brother WARD finds the evidence difficult to understand and raises the question, Why did

the water only rise one inch in the six hours? I think the answer is that the water was gradually getting to its natural level and the pressure on the one side was decreasing, therefore it did not rise so rapidly. On the 27th February the plaintiff says it had not been working for the two days preceding; they proceeded to make investigations of a more or less scientific nature. Kotzee put down his rule and observed the water rising at once, one inch in a minute. At this time the pump was not working. His observations correspond to some extent to those he made on the previous occasion. The two inches appeared more rapidly, but then there had been no observation during the night on the previous occasion; the two inches on that occasion may have risen during the early part of the night. The evidence of Stevens is the strongest in favour of defendant. He says that, during the last three days previous to the removal of the hand-pump, there was a marked decrease in the supply; but we have it that there was always water in the enlarged bore-hole, except when the pump was working.

The water here has nothing to do with common law rights, but with a grant which is in the following terms: "The defendant gives the plaintiff half the water and the right to a water furrow out of the fountain." To my mind this constitutes merely a right to water leading, a servitude of water leading out of this furrow, and for anything that interferes with it plaintiff will be entitled to compensation. However, as the water was not overflowing, there is in this case no direct damage to the water leading. It is unnecessary to consider whether plaintiff would have the right to go up to the fountain and draw water in buckets and take it down to his farm. This has not been interfered with. Mr. *Hertzog* does not claim that his client has the right to water his cattle at the basin. If he had done so I should not have allowed it, because that would necessitate a servitude of driving cattle over the defendant's lands, which is not included in the grant. Has any damage been done to the future rights of the plaintiff in regard to his getting water at an earlier date, when the dyke is replenished? I think so; the supply of water which would have risen has been interfered with and his time for water leading has been put off by the action of defendant. His right to non-

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interference comes to practically the same thing as a right to underground water, as he has a half share of the prospect of getting water. I am therefore of opinion that there should be judgment for a declaration of rights. The defendant has no right by means of the well to interfere with the water; she had that right originally but has given it away, *i.e.*, the half share.

FAWKES, J.: I concur with the CHIEF JUSTICE. The only point on which we differ from my brother WARD is on a question of evidence. His difficulty lies in the fact that the water in the spring increased during the night to the extent of two inches, when the pump was working slowly, and that there was a lesser increase of one inch during the day when the pump had been stopped. That might be accounted for by the fact that during the night the water had been allowed to rise to its level and therefore there was not the same pressure.

The expert evidence is not very reliable, but I am satisfied that the pumping did affect the water at the fountain. Other causes may have been at work as well, but that does not matter. By using the well the defendant has increased the difficulty of the supply of water at the fountain.

The plaintiff was declared entitled to the free and undisturbed flow of the water of the said spring. The defendant was ordered to pay £5 damages, the costs of the action, and plaintiff's expenses as a necessary witness.

Plaintiff's Attorney: *J. P. van Zyl*; Defendant's Attorney: *J. G. Fraser*.



DE BRUIJN v. LOUW.

1905. *March 10.* MAASDORP, C.J., and FAWKES and WARD, J.J.

Servitude.—Common fountain.—Right to water.—Diverting flow of water.

Where a fountain was situated on the common boundary of two farms, some of the "eyes" or sources being situated on one side of the line and some on the other, but the water being collected in one common pool extending on both sides of the line, and such water had throughout been used in common by the owners of the farms; *Held* (WARD, J., dissenting), that such fountain was a common fountain, and that the owner of one of the farms was not entitled to divert the water from the fountain by digging a well and erecting a pump in close proximity. Per MAASDORP, C.J.: Whenever a fountain is situated directly on the boundary line of two properties, it will generally be presumed to be common property; it being a principle of universal application to walls, ditches and passages, running along a common boundary line between two properties, that where their origin is lost in the past they must be regarded as common until the contrary is proved.

In this case plaintiff brought an action, (a) for declaration of rights to the free and undisturbed flow of water along a certain underground channel to and in a certain fountain on the farm Zwartfontein; (b) for an order commanding defendant to fill up a certain well dug by him close to the said fountain, and to remove certain pumping apparatus placed therein, and to restore to its original state the said channel cut off by defendant, and to cause the flow of the water along the said channel to resume its previous course or in default to pay £1000 damages; (c) for £500 damages and costs.

The declaration set forth that plaintiff was the owner of the farm Zwartfontein and defendant the owner of the farm Middelwater, adjoining one another. That upon the boundary line of the said farms, and situated partly on the one and partly on the other farm, there was and had been for the last forty years and

more an open common fountain supplied by a common spring in the said fountain on the boundary of the two farms. [There was also an allegation that the spring was fed by a defined underground channel, but the declaration was amended so as to omit that allegation]. That for over 40 years and since time immemorial, the owners of these two farms and their predecessors in title had and exercised the right of using the water from the said fountain and spring in common. There also existed a certain servitude in favour of Zwartfontein entitling the owner to lead water to his lands from the fountain along a furrow running for some distance over Middelwater. Up to June, 1904, plaintiff had irrigated his lands and watered his stock from the fountain, without any interference on defendant's part; but in that month defendant maliciously and with the object of diverting the water from the said fountain and spring, and well knowing that such would be the effect of his action, dug a well and erected a windmill pump at a distance of not more than two yards from the open fountain, thereby causing the water from the open fountain and spring to flow and be diverted into the well so dug by him and pumped thence and appropriated by defendant for his own use; in consequence whereof plaintiff had suffered damage to the extent of £500.

In his plea the defendant admitted that a certain spring or fountain existed near the boundary of the aforesaid two farms, the water whereof was led by a furrow passing through a portion of both farms to a dam situated partly on the one and partly on the other. That the spring had for many years up to 1894 been used jointly by the respective owners of the two farms, but that it was situated entirely on Zwartfontein and not partly on Middelwater. No servitude or right of user existed or had existed over the farm Middelwater in favour of the owner of Zwartfontein. In 1894, 1896 and 1903 plaintiff had rendered it impossible for defendant to make use of the said water for irrigating his lands and his lands have gone out of cultivation, in consequence whereof the defendant in June, 1904, dug a well and erected a pump on his farm Middelwater in the neighbourhood of the said spring for the purpose of irrigating his land; the water being used solely for the purpose of benefiting defend-

ant's own land. Defendant pleaded in the alternative that should the Court find that any servitude existed, such servitude or right was annulled by mutual consent in 1903.

From the evidence it appeared that close to the fountain in question was a common beacon; the boundary line from this beacon was fenced in and passed through the fountain. Ever since 1866 this fountain was used by defendant's father and the then owner of Zwartfontein as a common watering place for stock, the surplus being used for irrigation. In 1870 the respective owners did away with the common watering place and used the water for irrigation purposes. In June, 1904, the defendant made a well on Middelwater, the debris was thrown towards the fountain, practically filling up the pool of the fountain. Plaintiff cleared the debris from his side of the fountain. Before the well was dug water was seen rising on the Middelwater side of the fence. Whenever the windmill, which was put there in June, 1904, worked, the water in the fountain disappeared, and when the pump did not work the water began to run again in the fountain and into the furrow.

The pool of the fountain had been faced with stones; these stones, notwithstanding the debris that had been thrown there, were still visible on the Middelwater side, but had been washed away on the Zwartfontein side. An agreement had been come to between defendant's father and plaintiff's predecessor in title in 1870, whereby the latter was to use the water in the fountain for four days in the week and the former on the remaining two days.

Hertzog (with him *Borckenhagen*), for plaintiff: There was no doubt that the fountain in question had been used in common within the memory of man. See Wodon, *Repertoire generale du droit des eaux et cours d'eaux*, p. 137, secs. 87-93; *van Rhyn G. M. Co. v. New Chimes G. M. Co.* (1 Off. Rep. [Eng.] 328).

Barclay Lloyd (with him *P. U. Fischer*), for defendant, quoted *Struben v. Cape District Waterworks Co.* (9 S.C. 68); *Meyer and Others v. Johannesburg Waterworks Co.* (*Hertzog* 7).

WARD, J. (dissenting): In this case the plaintiff complains that the defendant has sunk a well and erected a windmill pump on his (defendant's) land, by which the plaintiff's rights are infringed, and he prays that the Court may grant judgment: (a) declaring the plaintiff entitled to the free and undisturbed flow of water along a certain alleged underground channel which has been interfered with by the operations of the defendant; (b) compelling the defendant to fill up the well, to remove the pumping apparatus, to restore the underground channel to its original state, and to cause the water to resume its flow into the said fountain, or pay £1000; (c) for £500, damages.

The existence of any underground channel has been abandoned by the plaintiff. The water therefore which the defendant is alleged to have intercepted or abstracted must be taken to be percolating water. From the evidence it appears that the plaintiff and defendant are owners of adjoining farms named Zwartfontein and Middelwater respectively. Water rises through crevices on the defendant's side, and through bore-holes and perhaps crevices also on the plaintiff's side of the boundary line from an underground spring. The water thus rising has since 1866 been collected in a shallow basin, measuring about ten feet by twelve, situated partly on the defendant's and partly on the plaintiff's farm. The water thus rising and collected passes through a furrow, situated at first on the plaintiff's land but afterwards passing to the defendant's and was used by both parties or their predecessors in title for the purpose of irrigating their respective lands. The use of the water prior to 1870 was regulated by agreement, the owners of the two farms dividing it equally between them. In 1870 a fresh agreement was come to by which the owner of the defendant's farm was to get one-third of the water passing along the furrow and the plaintiff two-thirds; the owner of the defendant's farm was also to get drinking water and water for his stock from a fountain situated on the plaintiff's farm. The plaintiff appears to have been under the impression that this agreement was still in force. The defendant says it was put an end to practically about 1893, and more recently about 1903. This is a matter, however, which it is unnecessary to discuss, as the Court is unanimously of opinion

that the agreement came to an end on the decease of the parties to it. These are briefly the facts.

Now the owner of land is the owner of the water standing thereon or flowing over or under the surface and not forming a definite stream. An owner of land has also the right to sink wells in his own ground, and may by pumping or otherwise acquire for himself water which would by percolation find its way into his neighbour's ground. He may even by such means abstract from his neighbour's ground percolating water. I say nothing about the qualification that such owner must not exercise his rights maliciously, because the question of malice does not enter into this case. It is laid down in a fragment to be found in the *Pandects* (39, 3, 1, 12) as follows: "Finally Marcellus lays down that if a man digging a well in his own land diverts the sources of his neighbour's water supply, he is liable neither to an ordinary or extraordinary action." This is cited by Voet (39, 3, 4), and has had the approval of the English Court of Exchequer Chamber in *Acton v. Blundell* ([1843] 12 M. and W. 324), and of the House of Lords in the more recent case of *Chasemore v. Richards* ([1859] 7 H.L. 349). It is unnecessary to go further into this part of the case, because there is no difference of opinion amongst us.

This being the case, has the defendant done or suffered anything to be done, or is there anything in the relation in which the parties stand to each other, which entitles the plaintiff to come to this Court and ask that the defendant be debarred from exercising his ordinary rights as owner of the farm Middelwater? Paragraph 5 of the plaintiff's declaration states that for over forty years and from time immemorial the owner of the farm Zwartfontein had the exclusive right and servitude of using the water from the fountain on the boundary of the two farms for four days out of every six, the other two days being set aside for the owner of Middelwater. As a matter of fact the only user of this water of which we have any evidence is that it was used in accordance with contracts entered into by the respective owners of the farms. At first Middelwater got half, but this, as I have already stated, was in 1870 reduced to one-third. As the water was used in pursuance of contracts

defining the rights of the parties, I fail to see how either party was prevented from terminating such contract, or how any servitude can arise from the user thereunder. I need hardly say that if at any time before the first of these contracts was entered into the plaintiff or his predecessor in title had acquired the servitude alleged in the declaration, then, the contracts having lapsed, the servitude might be taken to have revived. But there is absolutely no proof that any such servitude was acquired in 1866, the date from which the contracts commence. Indeed, from what we know of the settlement of the country, it is scarcely possible that a user for the period of prescription prior to 1866 existed or could be proved. But I go further, and say, that in the circumstances of this case it was legally impossible for the plaintiff or his predecessor to acquire a servitude over this fountain. The plaintiff did nothing at the fountain which the defendant could legally prevent, and where there can be no prevention there can be no prescription. There is an instructive American case, *Deadwood Central Railway Co. v. Barker* (decided in 1901, and reported at 86 North-Western Reports, p. 619). The headnote of the case is: "When a tunnel excavated on the plaintiff's land extended into the defendant's land, and the defendant permitted percolating water to flow through the same, which water was appropriated by the plaintiff at the mouth of the tunnel, the defendant was not estopped by his long continued disuse of the water from diverting it on to his own land, since plaintiff acquired no easement in defendant's property, the use being entirely on the plaintiff's own ground." In the present case the water of the fountain has, according to the evidence, been drawn off into the water furrow on the plaintiff's ground. In my opinion, therefore, it was legally impossible for the plaintiff to acquire the servitude he claims over the fountain.

So far as the pleadings are concerned this disposes of the case. But this Court has ample power to amend, and it has never hesitated to exercise this power, in order that the real point in dispute between the parties may be decided, taking care, of course, that neither party is prejudiced by the amendment. In this case, as I understand the matter, it is suggested

that although the plaintiff may have no right in this well by immemorial user or servitude, yet that the well being on the common boundary, it is a common well and that the plaintiff is a joint owner thereof. It seems to be deduced therefrom that this fact debars the defendant from exercising the right he would otherwise have of sinking a well anywhere he liked on his own ground. The subject of the rights and obligations of adjoining owners does not seem, so far as I can ascertain, to be treated systematically by the Roman-Dutch writers. The French writers Domat and Pothier deal with the matter. The former writer has a whole title (bk. 2, tit. 6, p. 308) the heading of which is: "Of those who have lands or tenements bordering upon one another." Pothier goes into the matter very fully in two appendices added to his *Treatise on Partnership*. These will be found at vol. 4, p. 308 of his collected works. Article 5 of the first appendix deals with the community of boundary wall, and of the things which are common as regards neighbours. Neither writer has any reference to springs on boundaries being common. I asked the learned counsel on both sides if they would give me a reference to any authority for the statement that a spring was common merely from the fact that it was on the common boundary, and they could give me none. I assume therefore that there is no such authority. In view of this lack of authority and of the silence of Domat and Pothier on the subject I am unable to come to the conclusion that a spring is common merely because it rises close to a common boundary. On the contrary art. 611 of the French Code, reproduced in the Civil Code of Lower Canada, art. 502, lays down that he who has a spring upon his land may use it and dispose of it as he pleases. I may add that I have referred to the Codes of New York, of California and the very complete and recent Code of North Dakota, and I find nothing in these Codes suggesting that water rising near a common boundary makes a common fountain, although they deal with the rights and obligations of neighbouring properties as regards common walls, hedges, trees, etc. But even if the fountain were common, I fail to see that this fact would deprive the defendant of the right of exercising his ordinary owner's rights on his own land and over which the community does not extend. If it were

otherwise, then the plaintiff if he were entire owner of the well could not interfere with the defendant, but because he only owns half he can. This leads to the inevitable conclusion that a part, if not greater, is more valuable than the whole. My judgment is for the defendant with costs.

MAASDORP, C.J.: There is no doubt as to what the common law rights of the proprietors of adjoining properties are with respect to underground waters. There is no doubt that each proprietor is entitled to dig down upon subterranean waters moving in veins and percolations and undefined channels, even though by so doing he may divert the water from a neighbour's well; but the case is quite different where there is a servitude. Voet (8, 3, 6) clearly limits an owner's right in such a case where he says: "It is free to every one to open up upon his own ground subterranean veins, by which water flowing down rises on another's ground, because by so doing he makes use of his own property; so long as a servitude to the contrary has not been established." No man therefore has a right to interfere with underground waters where a servitude has been established, if by so doing he prejudices the right of servitude, and this rule was applied by this Court in the lately decided case of *Snijman v. Boshoff* (*supra*, p. 1). The question in the present case therefore resolves itself into whether there was or was not a servitude. If the fountain in question was a common fountain, then there clearly was a servitude, because a common fountain like a common wall, is a combination of ownership and servitude; that is to say, each proprietor has the ownership of the part of the fountain on his side of the line and is entitled to a servitude over the portion on his neighbour's side of the line, and *vice versa*. The real question therefore, is, Is the fountain in question a common fountain?

Now it may be stated generally that whenever a fountain is situated directly on the boundary line of two properties, it will be presumed to be common property. No direct authority applicable to fountains is required for this proposition. It is a principle of universal application to walls, hedges, ditches and passages running along a common boundary line between two properties,

that where their origin is lost in the past, they must be regarded as common until the contrary be proved ; see Maasdorp's *Institutes of Cape Law* (vol. 2, p. 179), and there is no reason why it should not be applied to the case of a fountain situated on such common boundary. In the present case the fountain is situated on the common boundary of the two farms, Zwartfontein and Middewater, some of the eyes being situated on one side of the line and some on the other, but the water being collected in one common pool extending on both sides of the line. Under these circumstances it comes to the same thing as if the water had risen by one eye situated exactly on the boundary line ; in which case there can be no doubt as to what the rights of the parties would be. In addition to the presumption already mentioned, however, we have the fact that when these two farms, upon which there was no water, were originally granted by the Government, the common boundary of the farms was placed directly across the middle of the fountain, showing that the grantor intended that the use of it should be common to the two farms. In addition to this we have the fact that, as far back as anything is known about this fountain, it has been used in common by the owners of the two farms, for a considerable period under an express agreement as to the mode in which such use was to be exercised by them, and the defendant actually at one time, when he thought his rights were being interfered with by the plaintiff, made a complaint to the plaintiff against such interference. In fact it may be stated generally that, until this present dispute arose, no doubt was ever raised as to the fountain being a common fountain. All uncertainty, however, is removed by the report of the two surveyors who inspected the fountain. The defendant must have known that a retaining wall did exist ; consequently he had come to the Court and sworn what was not true. It has been clearly proved, and has in fact been admitted by counsel for the defendant, that the well dug by defendant on his own ground did, when the windmill was at work, draw off all the water from the fountain.

The judgment of the Court will be : (a) A declaration that the fountain in question is a common fountain ; (b) an interdict restraining defendant from interfering with the free and undis-

turbed flow of the water of the said fountain ; (c) that defendant pay to plaintiff £50 as damages and also pay the costs of the action.

FAWKES, J. : I concur with the CHIEF JUSTICE. We decided in *Snijman v. Boshoff* (*supra*, p. 1) that, where a servitude existed, nothing could be done by the servient tenement to interfere with the dominant. The real question in this case is, Is there a servitude? The question of the common fountain has arisen, and the point whether there can be a community of property in a fountain. It appears to me to be a question of fact. We have the beacon close to the fountain and the position of the boundary fence, both of which go to indicate that it is a common fountain, and, in fact, the defence admits that it is a common fountain. There is, therefore, clearly a common fountain, and that being the case, there are reciprocal servitudes; neither owner could do anything to diminish the enjoyment of the use thereof by the other.

Plaintiff's Attorney : *J. P. van Zyl* ; Defendant's Attorneys
Botha & Titley.



EX PARTE VAN DER MERWE.

1905. March 22. MAASDORP, C.J., and FAWKES and WARD, J.J.

Wills.—Codicil.—Interpretation.—Presumption against fideicommissum.

By mutual will, various farms were bequeathed to the children of the testators or their descendants by representation. Subsequently a codicil was added to the will, to the following effect: "Should it happen that a mine of any kind of precious stone, minerals or base metals be discovered on any of the farms herein beforementioned in our testament and bequeathed to our children, then the legacy concerning such farm or farms shall lapse, and such farm or farms shall be sold by public auction and the proceeds equally divided amongst all our children, and in the event of predecease, their lawful descendants. In this case, though otherwise not, we declare to bequeath as a legacy to the child or children, whose right to any legacy as aforementioned may have become void by the discovery of a mine as just mentioned, the farm Toeloop, our lawful property." *Held*, that the codicil did not impose any *fideicommissum*. The reasonable construction to be given to the wording of the codicil was that in the event of a mine being discovered on any of the farms bequeathed during the lifetime of the testators, and so before the will took effect, the legacy in respect of such farm should lapse.

The two petitioners in this matter were the surviving spouses of Jacobus van der Merwe and Abraham van der Merwe and natural guardians of the minor children born of the marriages with their said predeceased husbands. Their said husbands were children of the late Sarah van der Merwe and Jacobus Johannes van der Merwe. By the will of the latter the farm Leeuwkuil was bequeathed to the late husbands of petitioners or their descendants by representation, together with certain two of their sisters, in certain proportions and subject to certain conditions; the ground and farms becoming the free property of the said children after the death of the survivor, but on condition that the survivor should have the free usufruct of the farms until his

or her death. Certain other farms were bequeathed to certain other children of the marriage in like manner. Subsequently in a codicil the following alteration or addition to the will was made: "Should it happen that a mine of any kind of precious stone, minerals or base metals be discovered on any of the farms herein beforementioned in our testament and bequeathed to our children, then the legacy concerning such farm or farms shall lapse, and such farm or farms shall be sold by public auction and the proceeds equally divided amongst all our children and in the event of predecease their lawful descendants. In this case, though otherwise not, we declare to bequeath as a legacy to the child or children whose right to any legacy as aforementioned may have become void by the discovery of a mine as just mentioned, the farm Toeloop, our lawful property." From the papers and documents filed it appeared that the farm Toeloop was disposed of by the testators during their lifetime.

The children to whom the farm Leeuwkuil had been bequeathed had entered into a provisional prospecting contract with one Sondermann whereby the latter acquired the right to prospect on the farm Leeuwkuil with the option to purchase. The petitioners now came to the Court to have the said contract confirmed by the Court in so far as their minor children were interested. Certain other heirs to whom other properties had been bequeathed appeared before the Court and claimed that in case the option to purchase Leeuwkuil was exercised, the purchase price should be equally divided among all the children of the testators abovementioned and in accordance with the terms of the codicil as above set forth. The matter had been before the Court in September, 1904, when the prospecting contract was confirmed, but the question of the appropriation of the purchase price of Leeuwkuil was ordered to stand over for further argument before the full Court.

A. Fischer, for the applicants.

Hertzog, for certain other heirs.

FAWKES, J.: This matter came before the CHIEF JUSTICE and my brother WARD on the 5th September last in the form of an

application for an order confirming a certain prospecting contract with option of purchase between the petitioners, representing their minor children, and the other owners of a farm named Leeuwkuil. The Court then confirmed the contract, but ordered the question of the appropriation of the purchase price, in the event of a sale, to stand over for further argument before the full bench.

The farm Leeuwkuil originally formed part of the estate held in community by Jacobus Johannes van der Merwe and Sarah, his wife, and it is under the terms of their joint will that the applicants claim the ownership of this farm. The other farms which formed the estate were bequeathed by the will to the remaining children of the testators with the exception of a farm known as Toeloop, and power was reserved by the will to alter or add to its provisions by either joint or separate act. The testators subsequently added a codicil to the will under the power reserved, and it is upon the construction of this codicil that the matter was adjourned for argument before the full Court. The material words in the codicil are as follows: "Should it happen that a mine of any kind of precious stones, minerals or base metals be discovered on any of the farms herein beforementioned in our testament and bequeathed to our children, then the legacy concerning such farm or farms shall lapse and such farm or farms shall be sold by public auction and the proceeds equally divided amongst all our children, and in the event of predecease their lawful descendants. In this case, though otherwise not, we declare to bequeath as a legacy to the child or children whose right to any legacy as aforementioned may have become void by the discovery of a mine as just mentioned, the farm Toeloop, our lawful property." The liquidation and distribution account in the joint estate of the late Mr. and Mrs van der Merwe was confirmed on the 29th December, 1903, and the farm Leeuwkuil was duly awarded to the parties to the prospecting contract, no mine up to that date having been discovered on the property. Mr. *Hertzog*, as representing the legatees who took the remaining farms under the will, now claims that in the event of minerals being found on Leeuwkuil and the option of purchase under the prospecting

contract exercised, the purchase price should, in accordance with the terms of the codicil, be divided equally *per stirpes* among the issue of the late Mr. and Mrs. van der Merwe, and the legatees, whose legacy, he argues, has thus failed should in accordance with the codicil be compensated. The farm Toeloop as a matter of fact was sold during the lifetime of the testators, but Mr. *Hertzog* proposes meeting this difficulty by a monetary compensation. The questions therefore that we are to determine are: Firstly, did the legatees acquire full ownership of the farm under the legacy on the will taking effect, or, secondly, was there any *fideicommissum* attached to the legacy? A legacy to a person *in esse* vests at the death of the testator, unless there is a clear intention expressed in the will of suspending it. The presumption is that the testator intended the property to pass immediately on his death. No doubt in construing a will we should endeavour to give effect as far as possible to the intention of the testator, but this must be gathered from the words he has used in the will, and we must not do violence to language in order to arrive at his intention. I do not understand Mr. *Hertzog* for a moment to have argued that the testators by this codicil intended to suspend the vesting of the legacy or to postpone the enjoyment of the property bequeathed. Such a contention would have been absurd, as I understand he rests his case on a condition which he says was attached to the legacy. It was, however, pointed out in the course of the argument that such a condition would be in the nature of a *fideicommissum*. The presumption of law is against the imposition of a *fideicommissum*; no *fideicommissum* will be inferred unless the testator's intention to create one can be clearly gathered from the wording of the will. Where doubt arises as to his intention, the law presumes that he wished to pass the property unfettered. I think the reasonable construction to be given to the wording of the codicil is that in the event of a mine being discovered on any of the farms bequeathed before the will took effect, the legacy in respect of such farm should lapse. The bequest of the farm Toeloop is consistent with the construction; were we to adopt the construction Mr. *Hertzog* has pressed we should have further to hold that the testators intended to impose a *fideicommissum*.

upon Toeloop in favour of uncertain persons, for an indefinite period, and upon the happening of a very problematical event.

This intention, I think, cannot be gathered from the wording of the codicil. In bequeathing Toeloop the testators must have contemplated that at their death the bequest would either take effect or the farm pass into the residue of their estate. I do not place great importance on the fact that the testators disposed of this farm in their lifetime; but that they did bequeath it in the codicil to provide compensation to legatees whose legacies might lapse strengthens my opinion that they contemplated minerals being found on the estate during their lifetime, and a legacy possibly lapsing under the provisions of the codicil. Unless we hold that the contingency the codicil is intended to meet was to arise prior to the will taking effect, the words used by the testators would raise in my mind so serious a doubt of what they really did intend that I should be driven to the legal presumption that the legacy was given unfettered.

The order of the Court should therefore be a direction that the purchase price, in the event of the option of the purchase being exercised, be paid to the owners of the farm Leeuwkuil, the shares of the minors to be paid into the hands of the Master.

MAASDORP, C.J., and WARD, J., concurred.

Applicant's Attorney: *G. A. Hill.*

BOYD v. MANCHESTER ASSURANCE COMPANY.

1905. *March 27.* MAASDORP, C.J., and FAWKES and WARD, J.J.

Insurance.—Previous fire.—Question in proposal form.—Answer written down by the agent for the insurer.

The proposal form for an insurance signed by B and which was presented to him by C, the agent for M, the assurance company, answered in the negative a question therein proposed by M as to whether B had ever had any loss by fire, either in the premises containing the merchandise insured or elsewhere, and, if so, to state particulars. The policy made the proposal a part and the basis of the contract of assurance and a warranty on the part of the applicant, and provided that any misstatement of, or omission to state any fact material to be known for estimating the risk, would render the policy void as to the property affected by such misstatement or omission. As a fact B had previously had a fire in the Transvaal. The proposal form had been drawn up and filled in by C and, so B alleged, without B's authority and without C asking him for any information. It appeared in evidence that a year previously B had applied to M for another policy, and on the proposal form had answered the same question in the negative. B admitted that if he had had to fill in the proposal form in this case himself he would still have answered the question in the negative. The Court found as a fact that the proposal form was filled in by C at the request or at any rate with the consent of B, and that the information contained in the answers was communicated by B to C. *Held*, that the policy was void.

The plaintiff, a general dealer, residing in Bloemfontein, brought an action against the Manchester Assurance Company on a certain policy of insurance dated the 23rd April, 1903 whereby defendants insured against loss by fire the general merchandise of plaintiff for £1000. On the 14th May, 1904, the general merchandise together with the building wherein the same was stored, was destroyed by fire. Defendants having

refused to pay the insurance money the plaintiff now sued for same.

Defendants pleaded that it was a condition in the policy upon which plaintiff relied, that any misstatement of, or omission to state any fact material to be known for estimating the risk, would render the said policy void as to the property affected by such misstatement or omission. That prior to the said policy of assurance being entered into, the plaintiff applied for the said assurance by written form of proposal. In this proposal, which by the terms of the policy was made a part of the same and the basis of the contract of assurance and a warranty on the part of the applicant, the plaintiff in answer to the question therein proposed by defendants as to whether he had ever had any loss by fire, either in the premises containing the merchandise insured or elsewhere, and, if so, to state particulars, wrongly answered or caused the said question to be answered in the negative. That by so doing he had made a misstatement and concealed and omitted certain facts known to him and unknown to defendants, which were material for them to know in estimating the risk undertaken by defendants, seeing that he had previously had a fire in 1897 in the district of Heidelberg, Transvaal. In consequence of the misstatement set forth above the policy had been rendered void and defendants had incurred no liability under the same.

Plaintiff replied, whilst admitting the previous fire and the incorrect answer, that the proposal form referred to had been drawn up and filled in by the defendants' agent, Cadman; that save and except the answer to question 13, Cadman, had filled in the whole form without plaintiff's authority and without asking him for any information; that he had signed the form at Cadman's request without examining the same.

The defendants rejoined that the form had been filled in by Cadman, but at the request and from information supplied by the plaintiff, and that plaintiff signed the same after perusal.

The conditions which by the policy were made part thereof, contained amongst others the following provision: "Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which property to be so

insured is contained, or any misstatement of, or omission to state any fact material to be known for estimating the risk, renders this policy void as to the property affected by such misdescription, misstatement, omission respectively."

It appeared that a year previous to this policy, plaintiff had applied to defendants for a policy of insurance and that on the proposal form a negative answer had likewise been given to the question whether plaintiff had ever had a fire before either in the same premises or elsewhere. Plaintiff further admitted in cross-examination that he would in the case before the Court also have answered the question referred to in the negative, if he had had to fill the form in. He did not fill this form in nor did he read it, because he was very busy serving his customers and was in a hurry to get back to the counter, the signing having taken place in his office in his store.

A. Fischer, for plaintiff, referred to *Carter v. Boehm*, Smith's *Leading Cases* (9th ed., vol. 1, 522); *Pereira v. Equitable Marine and Fire Assurance Co.* (16 S.C. 273); *Simon v. Equitable Insurance Co.* (9 S.C. 455); *Drysdale v. The Union Fire Insurance Co.* (8 S.C. 63).

Hertzog (with him *de Jager*) for defendants, referred to Porter on *Insurance* (3rd ed. 173); *Johns v. North British and Mercantile Insurance Co.* (20 S.A.L.J. 62); *London Assurance v. Mansell* (L.R. 11 Ch. D. 363).

Cur. adv. vult.

MAASDORP, C.J.: In this case the plaintiff sues the defendant company for £1000, being the insurance money alleged to be due to him under a certain policy of insurance obtained by him from them. The amount of loss is not in dispute between the parties; the only question being whether under the terms of the policy and of the answers to the proposal of insurance made by the plaintiff to the defendants, the latter are liable for loss. On this point the defendants plead that the plaintiff in reply to question number 8 on the proposal form, namely: "Have you ever had a

loss by fire either in these premises or elsewhere? If so, state particulars," gave for answer: "No," and that such answer was a misstatement inasmuch as the plaintiff had previously had a fire, and that the policy was thus voided. To this plea the plaintiff replies, admitting the previous fire, but adding that the proposal form (including the answer to the 8th question) was filled in by the local manager, and that this was done without the plaintiff's authority; but he admits that he signed the document after it had been so filled in, without, however, examining it. The rejoinder of the defendants is that the answers were filled in by the manager, Mr. Cadman, but at the request of the plaintiff, who supplied the materials.

The first thing then to ascertain is, what were the actual facts of the case. Now the Court is satisfied, as well from the evidence led by the plaintiff as from that of Mr. Cadman, that the proposal form was taken by the latter to the plaintiff's store on Saturday, the 18th April, 1903, ready filled in. Unfortunately Mr. Cadman's recollection as to the circumstances is so defective that he is unable to give us any information as to how he got the information upon which he filled in the answers, and is even under the impression that he was at the plaintiff's store only upon this one occasion, but still states that he must have got the information from the plaintiff. Now there is internal evidence in the answers themselves that Cadman could not have filled in all the answers without getting the necessary information either from plaintiff or someone acting on his behalf, and he certainly could not have answered the 8th question without such information. Where then did he get it? We are fortunately assisted here by the plaintiff, who says that he had seen Cadman on two occasions previous to the 18th April, 1903, when he had been asked about getting his stock insured, and had, so to say, a general conversation about insurance. Now, that the conversation could not have been very general is clear from the fact that in the first case the insurance charges must have been discussed and that he found them too high, and consequently he decided not to insure for the full amount. He further admits that Cadman must have found out from him to whom the premises belonged, and also that some conversation took place with

respect to the picture-frame maker, Woollen. We are therefore justified in concluding that as no discussion took place on the 18th April, insurance was not discussed at the two previous interviews in a general sort of way, but that the particular insurance which was in question was specifically discussed, and that Cadman then got the information which he put into the answers to the proposal form and more especially that for the answer to question 8. It is inconceivable that Cadman would have taken upon himself the responsibility of answering such a question without first having put the question to plaintiff, especially when we consider how careful he was at the interview of the 18th April to make sure that the question as to the oils and the lights had been properly answered. In addition to this we have the evidence of the plaintiff who candidly states that if he had answered the question himself, he would have answered it in no other way than it had actually been answered by Cadman, and the further fact that a year previously he had given the same answer in an application made to the same company on the 18th April, 1902. This being so, we come to the conclusion that the proposal form was filled in by Cadman at the request or at any rate with the consent of the plaintiff, and that the information contained in the answers was communicated by plaintiff to Cadman. In further support of this view we have the fact that the proposal form was placed by Cadman before plaintiff for signature in an open and *bond fide* manner, and that plaintiff had every opportunity of reading and examining it, if he had not been in such a hurry to get back to his customers. He was not hurried by Cadman who, according to the witnesses, was in no hurry himself and had been strolling about the store and looking about him whilst waiting for the plaintiff to be disengaged, a matter for which there was no necessity in the interests of the company as he had already got all the information he required upon his proposal form. The plaintiff was further put upon his guard, that he was not to accept the proposal form to be correct as a mere matter of course, by Cadman calling his attention to the answer to question 13, which he advised him to alter. Notwithstanding this the plaintiff alleges that in the hurry he signed the document without reading or examining it.

Now the rule is laid down by Porter (3rd ed. p. 447) that where an agent for the insurer writes the answers of the assured for him, the assured is presumed to have read such answers before signing them. This presumption may no doubt be rebutted by evidence that the assured was prevented from reading the document, or that he was led to believe that the contents were other than they really were, but in this case there is nothing of the sort, the Court being convinced that Cadman acted in a perfectly open and *bond fide* manner, and that if plaintiff is unfortunately to suffer any loss in this matter he has to attribute it to his own hurry. At the same time it is pretty clear that even if he had not been in a hurry he would have answered question number 8 exactly in the same way.

Judgment must therefore be for the defendants with costs.

FAWKES and WARD, J.J., concurred.

Plaintiffs Attorney: *W. D. E. Watkeys*; Defendant's Attorney: *J. P. van Zyl*.



BROWN v. REX.

1905. March 31. MAASDORP, C.J., and WARD and FAWKES, J.J.

Criminal procedure.—Liquor laws.—Uncorroborated evidence of trap.

C, a trap, while investigating alleged illegal sales of intoxicating liquor, met one D who introduced him to B. C stated that B supplied him with liquor for which he (C) paid; D, contradicting this, the Court *held* that it was unsafe to convict B on the uncorroborated evidence of a trap.

The accused in this case was charged and convicted before the Resident Magistrate of Ladybrand of contravening section 52 of Ordinance 8 of 1903, in that on or about the 15th March, 1905, and at the railway refreshment rooms, Modderpoort, he wrongfully and unlawfully sold and dealt in and disposed of intoxicating liquor to John Callaghan and one Dawson, the said premises not being duly licensed.

On the 14th March, 1905, Callaghan, a sub-inspector in the Central South African Railways, went to Modderpoort to investigate alleged unlicensed sale of intoxicating liquor at the railway refreshment rooms. He met Dawson, a checker in the employ of the C.S.A.R. at Modderpoort, and introduced himself as an insurance agent. He spoke to Dawson about getting a drink, whereupon the latter took him to the bedroom of the accused which was in the same building as the refreshment rooms. Callaghan stated that they then had drink for which he paid. Dawson however denied that any liquor was supplied to them for which they paid. There was no evidence corroborating Callaghan. The case came before the Court for review.

A. Fischer, for the accused: The uncorroborated evidence of a single trap was not sufficient to justify the magistrate in convicting. *Goldberg v. The Queen* (5 H.C.G. 64).

Barclay Lloyd, for the Crown : A trap is not an accomplice, consequently his evidence need not be corroborated.

The sentence and conviction were quashed, the Court holding that it was unsafe in this case to convict on the uncorroborated evidence of a trap.



EX PARTE VAN HEERDEN.

1905. June 2. FAWKES and WARD, J.J.

Wills.—Interpretation.—Fideicommissum.—Prohibition against alienation.—Powers of Court.

By a clause in their mutual will the testators provided as follows :

“ And now proceeding to the election of heirs the testators declare to nominate and appoint as their sole and universal heirs their children procreated jointly out of this marriage or that might still be born, and at the predeceasing of one or more of them then their lawful descendants by representation, that is in all the goods to be left by the testators, nothing excepted, and especially their farm Bultfontein, district Rouxville, Orange Free State ; under the express conditions, however, that the said heirs may not sell, lease, give in use or burden with hypothec or in any way alienate the immovable property to strangers which they shall inherit in this way ; these conditions shall remain in force to the fourth degree ; our heirs shall, however, have the right to sell to one another the immovable property to be inherited by them for not more, however, than £1 per morgen, and in that case the aforesaid conditions shall remain in existence.”

The heirs under the will made an application to the Court alleging that the said farm Bultfontein, which was the only asset in the estate, was of no pecuniary assistance to them on account of the small portion allotted to each, and that furthermore they were in very reduced circumstances ; consequently they had agreed to sell the farm in order to obtain a certain amount of capital to carry on business, the *pro rata* share of the minor heirs to be paid to the Master of the High Court. The surviving spouse, who was entitled to a usufruct over the farm, also agreed to the sale, and was prepared to cancel her servitude of usufruct. *Held*, that the clause in the will was equivalent to a prohibition against the alienation of the farm out of the family and therefore imposed a valid *fideicommissum* in regard to the property, and that the Court had no power to remove the restriction.

In this matter the petitioners were the children and surviving spouse of Hermanus van Heerden. By the will of the late

Hermanus van Heerden and his surviving spouse Anna van Heerden, the farm Bultfontein was bequeathed to the children of the marriage, subject to the usufruct of the survivor, and on condition that it should not be sold, leased, given in use, burdened or in any way alienated to strangers up to the fourth degree. The petitioners now alleged in their petition that the farm was of practically no pecuniary assistance to them on account of the small portion allotted to each. Further, that they had suffered heavily on account of losses sustained during the late war, that they were in very poor circumstances and were solely dependent on their manual labour for sustenance. Consequently the petitioners all agreed to the sale of the said farm in order to obtain a certain amount of capital to carry on business, the *pro rata* share of the minors to be paid into the office of the Master of the High Court. The usufructuary agreed to cancel her servitude of usufruct and consented to the sale of the farm on condition that it be sold for not less than £1, 10s. per morgen. The petitioners now applied for an order cancelling the servitude of usufruct on the farm Bultfontein and for leave to sell the farm free from any servitude of non-alienation.

Hill, for the applicants: The person in whose favour a *fideicommissum* had been created must be clearly marked out; such was not the case in the present instance. The restriction here was a personal and not a real one. See *Ex parte Erasmus* (decided by the High Court in 1904, not reported); *Nel and Others v. Nel's Executrix* (8 S.C. 189); *In re Carey* (11 S.C. 123); *Burge's Colonial Law* (by Sir H. Juta, p. 66); *Maasdorp's Institutes of Cape Law* (vol. 1, pp. 158, 198).

Cur. adv. vult.

FAWKES, J.: The petitioners are the children and one grand-child of the late Hermanus Jacobus Nicolaas van Heerden and surviving spouse Anna Maria Susanna van Heerden (born Fouchée), the surviving spouse joining in the petition with respect to her usufruct, and they pray for the cancellation of

a prohibition against alienation which by the mutual will of their parents is attached to their legacies. This prohibition reads as follows: "And now proceeding to the election of heirs, the testators declare to nominate and appoint as their sole and universal heirs their children procreated jointly out of this marriage or that might still be born, and at the predeceasing of one or more of them, then their lawful descendants by representation, that is in all the goods to be left by the testators, nothing excepted, and especially their farm Bultfontein, district Rouxville, Orange Free State; under the express conditions, however, that the said heirs may not sell, lease, give in use or burden with hypothec or in any way alienate the immovable property to strangers which they shall inherit in this way; these conditions shall remain in force to the fourth degree; our said heirs shall, however, have the right to sell to one another the immovable property to be inherited by them, for not more, however, than £1 per morgen, and in that case the aforesaid conditions shall remain in existence."

We are asked to free the property of this burden and to authorise a clear transfer on the ground that no persons are marked out by the will in whose favour any *fideicommissum* has been created. It is clear that the mere prohibition against alienation does not constitute a *fideicommissum* unless the persons are indicated in whose favour the prohibition is made; for otherwise such prohibition is of no effect as being, as Voet says, a bare precept of the testator which has no binding force (Voet, 36, 1, 27). But the members of the testators' family may be indicated as the fideicommissary heirs and a bequest made to the family by the insertion in the will of a prohibition against alienation out of the family (see Voet, *ubi. cit.*), and this view has been followed in several cases in South Africa; see *Du Plessis v. Smallberger* (3 Searle, 383). A prohibition against alienation to strangers is the same thing as a prohibition against alienation out of the family. The fact that no particular descendants of the issue of the testators are marked out as the beneficiaries raises no real difficulty, as in such case the fideicommissaries are to be ascertained by the common law rule of succession on intestacy (2 Burge, 110; Voet, 36, 1, 30).

In this view the petitioners hold the property subject to the prohibition against alienation out of the family. Whether this would be held under the terms of the will to extend to the fourth generation it is not necessary for us to decide, but it binds the petitioners and however hard and odious this prohibition may be considered the intentions of the testators are so clear that we cannot disregard them. The legislature alone can give the assistance Mr. *Hill* asks, and he is given leave to amend the petition for that purpose and to bring the application within the terms of Law 24 of 1896.

WARD, J.: The petitioners in this case are the heirs or representatives of the seven heirs under the mutual will of Hermanus Jacobus Nicolaas van Heerden and Anna Maria Susanna van Heerden (born Fouchée). The last-mentioned also signs the petition, being entitled to the usufruct of the farm Bultfontein. The petition sets out that the farm Bultfontein has been bequeathed to the petitioners with a certain restraint on alienation, that the farm being only 1824 morgen in extent the portion of each heir is so small as to be of no practical use to him, that the petitioners have been reduced to a state of poverty by the war, and that the only hope of improving their circumstances is by the sale of the farm, their only asset. The prayer of the petition is for a cancellation of the restrictions on alienation and also of the surviving spouse's right of usufruct.

The petitioners seem to assume that the restriction is a valid restriction and that the Court has the power to remove it. But this is not so. The Court has no power to remove a restriction on alienation which has been imposed by a testator and which is legally binding, because it may work hardship as regards the beneficiaries under the will. The present CHIEF JUSTICE of the Transvaal forcibly states the powers of the court in the case of *In re Erasmus* ([1902] T.S. 125). He says: "Our duty is to endeavour to ascertain the meaning and desire of the testator and to give effect to them. The Court cannot make a new will for testators." The only question which we have to decide is whether the restriction sought to be imposed by the testators is binding.

Now it is clear from the *Digest*, (30, 1, 114, 14) that mere prohibition of alienation has no effect, but where there is a prohibition to alienate out of the family of the testators that implies a *fideicommissum* in favour of the family. See van Leeuwen's *Censura Forensis*, 3, 7, 10; *Roman Dutch Law*, 3, 9, 6. See also, for perhaps the clearest exposition of the matter, Domat, 3, 3, 2, 5 and 12. Voet (36, 1, 27) also states the law thus: "Lastly, a *fideicommissum* can be left to a family. . . . Now there is also a bequest to a family when the testator forbids the alienation of a thing out of the family or directs that a thing should not go out of his line of descent or out of his blood." Burge (vol. 2, p. 112), summing up all the authorities, says: "A *fideicommissum* may be declared in favour of a family . . . one mode by which it is declared in favour of a family is by prohibiting any alienation of the subject of the *fideicommissum* out of the family." It is no objection that the order of succession is not pointed out, for when the testator has not himself prescribed the particular order of succession in which the several persons to whom he has limited his estate by *fideicommissum* shall take, that order which the law has established in cases of intestacy is to be followed. See Burge, vol. 2, 116; Voet, 36, 1, 30; van Leeuwen, *Roman Dutch Law*, 3, 8, 8; *Censura Forensis*, 3, 7, 11.

The only question now remaining is: Are the words "shall not alienate the immovable property to strangers" equivalent to a prohibition to alienate this property out of the family. I am of opinion on general grounds that this question must be answered in the affirmative. van Leeuwen (*Censura Forensis*, 3, 7, 8) lays down: "An intention of the testator which though not expressed yet is deduced as a necessary or manifest consequence from what has been expressed is considered as having sufficient effect to create a *fideicommissum*." Besides, there are many decided cases in which a *fideicommissum* has been assumed to have been created by such words. See *du Plessis v. Smallberger* (3 Searle, 383); *Lange v. Scheepers* (1878, Buch., p. 192); *Lange v. Liesching* (Foord, 55). There is the case also of *Ex parte Botha and Stander* (shortly reported in 14 C.L.J. 299), heard before the High Court of the Orange Free State in the Oct.-Nov. term, 1897, in which certain legatees sought to have the follow-

ing condition in a will declared nugatory: "That no child shall have the right to sell his portion of ground to a stranger" on the ground that a mere prohibition of alienation like this, without proper designation of who were eventually to take, was null. The court refused the application, holding that there was a sufficient designation of the children if not the family.

I am of opinion, therefore, that the intention of the testators was to create a restriction on the alienation of this farm in favour of their family, and that the application must be refused.

Applicants' Attorney: *G. A. Hill.*



ANDREW v. ANDREW.

1905. *July 1.* FAWKES and WARD, J.J.*Husband and wife.—Divorce.—Domicile.*

The parties were married at Glasgow, Scotland, in 1897; they lived in London until 1898 when plaintiff came to South Africa and in 1904 took up his residence in the Orange River Colony. In October, 1904, plaintiff sent his wife, the defendant, £25 to enable her to rejoin him; she refused to rejoin him and applied the money to other purposes. Plaintiff had accepted a permanent appointment as bookkeeper in a business in Kroonstad; he further stated in an affidavit that it was his intention to remain in the colony. Affidavits were filed showing that he had identified himself with a certain church in Kroonstad and was also secretary to a local syndicate. In an application for leave to sue defendant by edict for restitution of conjugal rights, failing which for divorce on the ground of malicious desertion; *Held*, that the application must be refused as the court was not satisfied that plaintiff had acquired a domicile in the Orange River Colony.

This was an application by the husband for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which for divorce on the ground of malicious desertion.

The parties were married at Glasgow, Scotland, on the 22nd December, 1897, and lived in London until August, 1898, when, it was alleged, the wife deserted the plaintiff. He arrived in South Africa in September, 1898, and came to the Orange River Colony in March, 1904. In October, 1904, the plaintiff sent his wife £25 to enable her to rejoin him, but she refused to come and had applied the money to other purposes. From affidavits put in it appeared that the applicant had accepted a permanent position as bookkeeper in a business in Kroonstad; he was also secretary to a certain syndicate formed in Kroonstad. The manager of the business in which the applicant was employed stated that as far as the business was concerned, the applicant would in all probability not be dismissed for some time. A

further affidavit was put in by the Presbyterian minister at Kroonstad to the effect that applicant identified himself with that church and took a great interest in everything, not as one who is but temporarily here, but as one who intends remaining for good. Applicant himself stated that it was his intention to permanently reside in Kroonstad.

Hill, for the applicant: There was no doubt that applicant intended taking up his residence permanently in this colony. He had no intention of returning to Great Britain, had abandoned his old domicile and acquired a new one in this colony. See *Hawkes v. Hawkes* (2 S.C. 109).

FAWKES, J.: The Court is not satisfied that the applicant has acquired a domicile in this colony. The proposed proceedings will affect the status of the parties and the Court must be satisfied, apart altogether from the acquiescence or objection of the other side, that the husband is domiciled here. Should the English or Scotch courts hold that the applicant was not domiciled in this colony, they would ignore the proceedings before this Court and would not recognise any subsequent marriage of either party. A case in point recently occurred in England where a divorce had been granted in one of the Australian colonies without, as the court held, the parties being domiciled there. Upon the question of their acquisition of a domicile of choice I would refer to the recent English case of *Livingstone v. Livingstone*, where it was held that a Scotch doctor who had been practising in England since 1889 had not acquired a domicile in the latter country. The application must be refused.

WARD, J.: I concur.

Applicant's Attorney: *G. A. Hill*.

McHARDY v. OLIFANT.

1905. July 4. FAWKES and WARD, J.J.

Purchase and sale.—Resolutive and suspensive condition.—Power of attorney.—Proceeding to final end and determination.—Interpretation.

O sold a horse to C for £19, of which £6 was paid on account. C gave O a document agreeing to pay the balance of £13 in two monthly instalments of £6, 10s. each. C sold the horse to M without having paid any further amount. O sued M for return of the horse alleging that by verbal agreement the sale to C had been made subject to a suspensive condition. The magistrate gave judgment in favour of O, holding that the suspensive condition had been proved. On appeal, *held*, that on the records the magistrate's finding was wrong; that the condition was a resolute one and that therefore the property in the horse had passed to C and from him to M. The presumption must be in favour of a resolute rather than a suspensive condition.

M had granted a power of attorney to defend the action in the magistrate's court, under which his attorney was authorised to proceed to the final end and determination of the matter. The Court was of opinion that such a power did not grant the attorney authority to give notice of, and prosecute an appeal from the magistrate's decision, but under the special circumstances of the case the appeal was allowed to proceed. This was not however to form a precedent.

This was an appeal from a judgment of the Assistant Resident Magistrate of Kroonstad, awarding a horse, the subject of dispute, to the plaintiff with costs.

The appellant (defendant in the first instance) had granted a power of attorney to defend proceedings of claim and demand instituted against him by Andries Olifant and proceed to the final end and determination of the matter. The question arose whether this power gave his attorney authority to give notice of, and to prosecute an appeal.

The Court intimated that it was of opinion that it did not,

but as the appellant, believing the power to be sufficient, had left the country, and as his attorney had given security to carry out any order of the Appeal Court, and no objection having been taken by the respondent, the appeal would be allowed to proceed. This was not however to form a precedent.

The plaintiff in the court below sold to one Clarke, a member of the South African Constabulary, a horse on the 1st March, 1905, for £19; of this amount £6 was paid on account at the time of sale, and the following document was given to the plaintiff:—

“I the undersigned do hereby agree to pay Andries Olifant the sum of £6, 10s. per month until the debt of £13 is paid off, being the balance of the sum of £19 for a horse; the said money to be paid at end of March and April.

CHARLES M. CLARKE, S.A.C.”

On the 8th April Clarke sold the horse to defendant and one Fothergill, both of whom were members of the South African Constabulary. The plaintiff claimed the horse from the defendant on the ground that he sold the horse to Clarke on condition that the property in it was only to pass to the purchaser on the payment of the full purchase price. The assistant resident magistrate in his reasons stated that he regarded the document set out above as simply a promissory note for payment of the balance due on the note and that in order to arrive at the conditions of sale he must rely solely upon the verbal evidence. He stated that he disbelieved the evidence of Clarke and the defendant and found that the horse was sold subject to a suspensive condition; that it remained the property of the plaintiff until the full price was paid; and that consequently the sale by Clarke to defendant did not pass the property in the horse to defendant, but that such property remained in the plaintiff to whom he ordered the horse to be returned. From this judgment defendant appealed.

Hill, for appellant.

Respondent not represented

FAWKES, J.: In this case the assistant resident magistrate states that he disbelieves the evidence of Clarke and the defendant, and that the evidence of Captains Kitson and Dixon has nothing to do with the case. Assuming this to be correct and further assuming that he was right in allowing verbal evidence to be led notwithstanding the document put in, the Court has to consider whether the magistrate was justified in finding on the verbal evidence which still remains on the record, that the sale was subject to a suspensive condition and not to a resolute condition. The plaintiff, whose evidence is relied on, says: "Clarke bought the horse from me for £19. He paid me £6 in cash and the balance he had to pay in two monthly instalments. I asked Clarke: If you cannot bring the money at the end of April, what then? He said: You can have the horse back then and return me the six pounds which I paid you." In cross-examination he says: "I told Captain Dixon that I made an agreement with Clarke that if he did not pay me at the end of April I could take the horse back." Apart from his allegations that the horse was his property this is the whole of the evidence of the plaintiff which throws any light on the transaction between him and Clarke. Now, on this evidence, was the sale one subject to a suspensive or resolute condition? In the case of *Keyter v. Barry's Executor* (Buch. 1879, p. 175) the Supreme Court of the Cape Colony decided that when goods are sold on credit, with a condition that if the price be not paid the vendor shall have the right of claiming the goods and that the purchaser shall not be able in any way to dispose of the goods, the *dominium* in the goods passes to the purchaser. This case seems to be on all fours with the present one as it is represented by the plaintiff. There is, however, another point not to be lost sight of, namely, that when there is a doubt as to whether a condition in a contract is resolute or suspensive, the Court will lean to its being resolute. Nathan's *Common Law of South Africa*, vol. 2, pp. 723, 724, says: "The construction of law will be in favour of a resolute condition (an out and out sale) rather than a suspensive condition. . . . the construction of South African courts has always been in favour of resolute sales." Having regard to this principle of construction as well as to the fact that no mention is

made in the document set out above, that the property in the horse remained in the plaintiff, we are of opinion that the magistrate's judgment must be set aside and the appeal allowed with costs here and in the court below.

WARD, J.: I concur.

Attorney for Appellant: *G. A. Hill.*



EX PARTE REDIKER.

1905. *July 6.* FAWKES and WARD, J.J.*Medical practitioner.—Admission.*

R, who held the necessary qualification for admission as a medical practitioner under chapter 97 of the Law Book, was admitted by the Military Governor to practise as a medical practitioner in 1900. He took out a license and practised, but owing to warlike operations he was obliged to leave the town where he had been practising. He returned in 1903 and applied to the Medical Officer of Health to be registered as a medical practitioner; his application having been refused by that officer he applied to the High Court. *Held*, that as plaintiff was entitled to be admitted under chapter 97 and had submitted his certificates to the authorities in 1900, the presumption was that his admission by the Military Governor was under the civil law and not under martial law, as was contended by the Medical Officer of Health. The application was granted.

The applicant, who had passed the *Staats-examen*, Germany, in 1886, alleged in his petition that he had been admitted to practise as a medical practitioner in the Orange River Colony by the Military Governor at Bloemfontein in September, 1900. He had taken out a license to practise as a medical practitioner and had renewed his license in January, 1901. In consequence of warlike operations he had been obliged to leave Reddersburg, where he had been practising, and it had been impracticable for him to return to that place until after the conclusion of peace. In January, 1903, the applicant applied to the Medical Officer of Health to be registered, but his application was refused on the ground that he was not duly admitted by the Military Governor in terms of chapter 97 of the Law Book, and consequently could not be registered under section 2 of Proclamation 10 of 1902, the law in force at the date of his application. Section 2 of Proclamation 10 reads: "Every person who on the day before the taking effect of this Proclamation shall have been duly ad-

mitted and lawfully qualified to practise as physician, surgeon in this colony, shall, notwithstanding the publication of this Proclamation, be entitled to continue to practise or carry on his calling as aforesaid without obtaining the certificate of registration referred to in the next succeeding section."

The applicant put in the following letter from Captain Trollope, D.A.A.G. to the Military Governor :

"Dr. Rediker is allowed to move from Edenburg to Reddersburg and may practise there as soon as he has taken out a license from the R.J.P. at Reddersburg. Dr. Rediker's certificates are returned herewith ; please acknowledge receipt."

Hertzog, for applicant, referred to Lord Roberts' Proclamation of 20th May, 1900, published in the *Gazette* of 29th June, 1900, appointing General Prettyman to carry on the civil administration of the Orange River Colony. The applicant had been duly admitted under chapter 97 of the Law Book and was entitled to be registered under Ordinance 1 of 1904.

Barclay Lloyd, for the Crown : In giving applicant permission to practise the Military Governor was acting under martial law and not under chapter 97.

FAWKES, J. ; The applicant was qualified to be admitted under the law in force at the time he was permitted to practise in 1900. The presumption, therefore, is that he was admitted under the civil law and not under martial law as contended on behalf of the Crown. The presumption is strengthened by the facts that he had submitted his certificates to the authorities, that he was a purely civil practitioner and had no connection with the military, and that no martial law regulation is produced dealing with the admission of medical practitioners, and also that the license which he took out was made obligatory under Law 20 of 1898, which only applied to admitted medical practitioners. An order will be granted authorising the applicant to be admitted and registered as a medical practitioner in this colony

WARD, J. : I concur.

Applicant's Attorney : *J. P. van Zyl*.

EX PARTE STEYN.

1905. July 6. FAWKES and WARD, J.J.

Antenuptial contract.—Signed under power of attorney and subsequent to marriage.—Registration.

S, a resident in the O.R.C., proceeded to van Rynsdorp, Cape Colony, for the purpose of being married. The parties desired to enter into an antenuptial contract, but as there was no practising attorney or law agent in van Rynsdorp, they executed a power of attorney to enable the contract to be signed before a notary public in Capetown. S was aware that owing to the postal arrangements the power of attorney could not reach Capetown before the solemnization of the intended marriage, and therefore, on the 30th December, 1903, just prior to the marriage, the parties executed an antenuptial contract before the acting resident magistrate at van Rynsdorp. The antenuptial contract was completed at Capetown under the power of attorney on the 6th January, 1904, and registered on the 8th January, 1904. S now applied for an order authorising the Registrar of Deeds of the Orange River Colony to register both the said antenuptial contracts. *Held*, that such an order issue in regard to the contract signed at Capetown saving the rights of creditors in respect to debts contracted after the marriage, but before the date of registration.

The petitioner, who resided at Heilbron, proceeded at the end of December, 1903, to van Rynsdorp, Cape Colony, to contract a marriage with Aletta van Zyl, then residing at Aries in the division of van Rynsdorp. The parties, wishing to enter into an antenuptial contract, were advised by friends (there being no practising attorney or law agent in van Rynsdorp) to complete a power of attorney so as to enable the intended contract to be passed before a notary public in Capetown, whereupon a power of attorney was duly completed by petitioner and his intended spouse and forwarded to Capetown. Owing to the postal arrangements petitioner was aware that the power of attorney could not reach Capetown before the solemnization of

the intended marriage, consequently he consulted the Acting Resident Magistrate of van Rynsdorp, who advised petitioner that an antenuptial contract could legally be passed before him, and a contract was thereupon completed by the parties before the acting resident magistrate on the morning of the 30th December, 1903, just prior to the marriage. The antenuptial contract had been duly passed at Capetown on the 6th January, 1904, and registered on the 8th January, 1904, under the power of attorney completed by the parties at van Rynsdorp. Petitioner now asked for an order authorising the Registrar of Deeds to register the antenuptial contract passed in Capetown subsequent to marriage, and also the contract passed before the assistant resident magistrate.

A. Fischer, for petitioner.

The Court authorised the registration of the antenuptial contract of the 6th January, 1904, saving the rights of creditors in respect of all debts contracted after the marriage and before the date of registration.

Attorney for petitioner: *C. J. Reitz*.



EX PARTE FICK.

1905. July 6. FAWKES and WARD, J.J.

Land.—Transfer duty.—Exemption.—Chapter 67 of the Law Book, secs. 20 and 21.

Where the survivor of spouses married in community of property who was entitled under the mutual will to a life usufruct of certain property bequeathed to the children, desired to pass transfer of the property in full ownership to the children, *Held*, that transfer duty must be paid; neither sec. 20 nor sec. 21 of the Transfer Duty Act, chapter 67 of the Law Book, which provide for exemption from transfer duty in certain cases, being applicable.

The petitioner was the executor testamentary in the joint estate of his late wife and himself. The parties had been married in community of property, and had on the 9th February, 1899, executed a mutual will, disposing of, amongst others, the farm Pharaosfontein in the district of Wepener as a massed asset of the joint estate to the children procreated in the marriage of petitioner with his predeceased first wife (not the deceased testator), subject to a life usufruct in favour of the survivor. The petitioner, at the request of the legatees, who desired to have transfer effected into their names, gave instructions for the drawing of the necessary deeds of transfer. The Registrar of Deeds contended that the legatees were bound to pay transfer duty on the full value of the bequest; petitioner, on the contrary, contended that as the bequest was one of a massed asset of a joint estate in which petitioner as survivor had duly adiated under the mutual will, transfer duty should only be paid on the half-share accruing from their deceased stepmother's estate and on such amount, if any, which they received from petitioner's side over and above the shares that would have been received by such descendants had they been petitioner's *ab intestato* heirs.

A. Fischer, for petitioner, referred to *Ex parte Murray* (18 S.C. 213).

Barclay Lloyd, for the Registrar of Deeds, quoted *South African Association v. Mostert* (1873, Buch. 31); also *Ex parte de Bruijn* ([1904] O.R.C. 59).

FAWKES, J.: This is an application for an order authorising the proper officer to accept payment of transfer duty on the half of the value of the bequest mentioned in the petition and on such of the other half share as may be over and above the share to which the legatees would have been entitled as *ab intestato* heirs, and further authorising the Registrar of Deeds to pass and register the transfer of the bequest. The bequest is made by the mutual will of the petitioner and his late wife, Helena, and in favour of the petitioner's children by a former marriage, reserving a usufruct to the survivor, and the petitioner as surviving spouse is desirous of transferring the farm in full ownership to these children. Mr. *Fischer* urges that, as regards the half share of the petitioner, the father of the legatees, the bequest being of a massed asset of the joint estate, the legatees are exempted from paying transfer duty under either sec. 20 or sec. 21 of the Transfer Duty Act, chapter 67 of the Law Book.

Now, the duty being payable but for the exemptions provided by the enactment, we must be satisfied that the case comes within the terms of these exemptions. Under sec. 20 the exemption is made in favour of a person who, although he may have acquired by inheritance, legacy, buying in or taking over, is also in the position of an heir *ab intestato*. The children do not fulfil this condition. The parent, whose heirs *ab intestato* they claim to be, is still alive. Mr. *Fischer* argued that as the father by adiation had deprived himself of the power of disposing of the estate, which must consequently at his death descend to the children to whom he now proposes to transfer it, the case should be treated as if he were already dead and the legatees entitled to the above statutory exemption. We cannot agree with this contention; the language of the section is clear, and we are satisfied the case does not come within the exemption. Sec. 21 extends the exemption to the children or descendants of a deceased spouse, who take by reason of the renunciation by the surviving spouse of a life interest created by the will of the deceased spouse,

where they would under sec. 20 or any other law have been entitled on the death of the surviving spouse to have obtained transfer without payment of transfer duty. In the present case the legatees are not the children of the deceased spouse who was a party to the will. In this view the application must be refused.

WARD, J.: I concur.

Applicant's Attorney: *C. J. Reitz.*



EX PARTE HORAK.

1905. July 6. FAWKES and WARD, J.J.

Land.—Transfer duty.—Exemption.—Chapter 67 of the Law Book, sec. 24.

Certain fideicommissary heirs executed a notarial deed whereby they renounced in favour of the fiduciary heir, who had remarried in community of property, their rights to the farms burdened with *fideicommissum*, which farms had been registered in the name of the second husband of the fiduciary heir after the liquidation account in the estate had been filed. An application that such deed should be registered free from payment of transfer duty on the ground that same fell within the terms of sec. 24 of the Transfer Duty Act, chapter 67 of the Law Book, was refused. The joint estate mentioned in the said section of the Act refers to the estate before it has been distributed.

The petitioner in this matter was married in community of property to Maria Celliers (born Weilbach), widow of the late Jan Celliers, and as being so married took over by certificate of registration from the estate of the late Jan Celliers certain two farms, subject to the conditions contained in the will of the late Jan Celliers and Maria Celliers (born Weilbach), namely: "That after the death of the survivor the properties shall be and become the property of the children or in case of predecease then their lawful descendants by representation, each for a like share." Seven of the children referred to above, being majors, and who are jointly entitled to and hold seven-eighths of the fideicommissary interest in the said farms—the one-eighth share being held by the only remaining child, a daughter, not yet having attained her majority—caused a notarial deed to be executed, by which they renounced jointly and severally, as well for themselves as for their respective heirs, successors and representatives, all their right, title and claim in and to their fideicommissary or reversionary seven-eighths share or interest in the said properties.

The said notarial deed was tendered for registration, but was refused by the Registrar of Deeds on the ground that transfer duty must be paid on the value of the said seven-eighths fideicommissary rights. Petitioner contended that as his said wife would have been entitled, in terms of article 24 of chapter 67 of the Law Book, to take transfer free of duty, whether she (or petitioner as married to her in community of property) took title fiduciary or out and out, the fact that the children who would be entitled ultimately to transfer as fideicommissary heirs now renounced their rights to ultimate transfer, did not make petitioner liable to payment of transfer duty.

A. Fischer, for petitioner.

Barclay Lloyd, for the Registrar of Deeds.

Cur. adv. vult.

FAWKES, J.: The petitioner, on his marriage in community with the widow of one Jan Daniel Celliers, took over by certificate of registration from the joint estate held in community by his wife with her former husband the farms Chicago and Waaronniet. These farms were bequeathed by the late Mr. Celliers and his then wife by the following codicil to their mutual will: "To the survivor of them the farm named Chicago . . . subject to the condition that at the death of the survivor, the hereby bequeathed farms shall belong to the children already born or still to be born from the present marriage, and on their predecease their lawful descendants by representation *per stirpes*, each for an equal share." The children of the marriage, with the exception of the only minor, have executed a deed renouncing their rights under this codicil to the fideicommissary or reversionary interest in these properties, and the Registrar of Deeds having required payment of transfer duty before registering this deed the petitioner seeks an order authorising the registration without such payment.

Mr. *Fischer* relies on section 24 of the Transfer Duty Act, which reads as follows: "Where a surviving spouse buys in or

takes over or inherits or obtains, in any lawful manner any fixed property out of the joint estate of himself and of his deceased wife or *vice versa*, no transfer duty shall be payable." Without deciding the legal effect of the words of the codicil, for the purposes of the case we may assume for the sake of argument that the clause in question created, as Mr. *Fischer* claimed, a *fideicommissum*. Otherwise, if a mere usufruct was given, there can be no question that transfer duty is payable. The deed in question, as Mr. *Fischer* contends, purports to extinguish a *fideicommissum* by a renunciation.

As to the legal effect of the deed if duly registered I wish to offer no opinion. The question we are asked is, Does the registration of this deed require the payment of transfer duty? If the property was bought in or obtained by the surviving spouse out of the joint estate of herself and her deceased husband transfer duty is not payable. In the present case, can it be said that it is bought in or obtained from the joint estate when, as we find from the certificate of registration which is put in, the distribution account has been filed and all the interest of the widow under her former marriage has now passed into the community of a second marriage. The joint estate mentioned in the section refers to the estate before it has been distributed. When once the property has under the liquidation account been disposed of under the terms of the will, the widow if she purchases any portion must pay transfer duty.

WARD, J.: The petitioner in this case is Jan Cornelis Horak, married in community of property to Maria Susanna Celliers, formerly married to Jan Daniel Cellers. Under the mutual will of the two persons last mentioned, Maria Susanna Celliers as surviving spouse was entitled to a life interest in the farms Chicago and Waaromniet, and after her death they were to pass to the children of the marriage or their descendants. The petitioner has obtained registration of these farms in his name by certificate of registration granted in pursuance of sec. 39 of Ordinance 33 of 1902. I presume this certificate was granted on the ground that the property was properly registered in the name of his wife to whom he is married in community. The

provisions of a codicil to the mutual will under which the surviving spouse, now wife of the petitioner, became entitled to these farms reads as follows: "The testators declare to bequeath to the survivor of them the farm named Chicago, together with the adjoining piece of ground known as Waaromniet . . . subject to the condition that at the death of the survivor the hereby bequeathed farms . . . shall belong to the children already born or still to be born from the present marriage, and on their predecease their lawful descendants by representation, *per stirpes*, each for an equal share." There were eight children of the marriage, seven of whom have attained their majority and these seven join in what is called a deed of renunciation of their rights under the codicil in the two farms mentioned. The deed of renunciation, after setting out the provisions of the codicil, proceeds: "Whereas his constituents, being the children and sons-in-law of the said testators, jointly are entitled to and represent and hold seven-eighths of the fideicommissary interest in the said property," and further stating that they "have agreed, for valuable consideration received by them, to renounce all their rights in and to the said landed property Chicago and and Waaromniet . . . as well for themselves as for their respective heirs, successors and representatives." The petitioner alleges that he is entitled under sec. 24 of chapter 67 of the Law Book to have the said deed of renunciation registered in the Deeds Office free of transfer duty, and the Registrar of Deeds has refused so to register it. The petitioner asks for an order of this Court compelling him to do so. The deed of renunciation, the registration of which we are asked to order, purports to renounce in favour of the surviving spouse and her present husband certain rights to which they are entitled under the codicil, and I entirely fail to see in what way the article referred to applies, the farms having passed out of the joint estate of the petitioner's wife and her former husband into the estate of the petitioner and his wife. The deed in question merely enlarges the rights of the petitioner and his wife in the farms now registered in his name. The case of *Hollins v. Registrar of Deeds* ([1904] T.S. 603), lays down that notarial deeds, conferring mere rights in *personam*, could not be registered against title in the

Deeds Office, and this raises the question whether the present deed is capable of registration at all, even if the parties were willing to pay transfer duty. If, as stated in the deed, the persons renouncing have only a fideicommissary interest, I am not prepared, without hearing counsel on behalf of the lawful descendants of the parties to the deed, to decide that the rights of the parties renouncing are anything but rights *in personam*, or a hope of acquiring rights. In that case this deed is certainly not capable of registration against the title, though it may, if modified, be capable of registration in the miscellaneous register; however, we have not sufficient material before us to decide the latter point. We presume it is registration against title that is asked for.

Attorney for applicant: *C. J. Reitz.*



NCHAKHA v. REX.

1905. July 7. FAWKES and WARD, J.J.

Criminal procedure.—Masters and servants.—Minor servant.

In order to render a minor criminally liable under sec. 37 of Ordinance 7 of 1904, it must be proved that the contract of service was to the benefit of the minor. When criminal proceedings are taken against minors under the Masters and Servants Ordinance full particulars should appear on the record as to (1) the exact terms of the contract of service, (2) the mental development of the accused, and (3) whether the rate of wages was that generally paid for work of the same description in the locality.

This case came before the Court by way of review from a judgment of the Special Justice of the Peace at Witziesshoek. The accused was charged with desertion under sec. 37 of Ordinance 7 of 1904, convicted and sentenced. On the 7th July, 1905, the matter came before the Court for the first time, when it was referred back to the special justice of the peace with directions to find the exact nature of the contract, more especially whether the minor received food and lodging, also as to the state of health and mental development of the minor, and what was the usual rate of wages in the district for a boy of that age for the particular service contracted for. On the 20th July the matter again came before the Court.

Barclay Lloyd, for the Crown, quoted *Fick and Others v. Rex* ([1904] O.R.C. 25).

WARD, J.: The accused is a native youth aged 14 years and was charged before the Special Justice of the Peace at Witziesshoek with desertion in contravention of sub-section 11 of sec. 37 of the Masters and Servants Ordinance (7 of 1904). He was convicted and sentenced to receive twelve cuts with a cane.

When this case came before me for review I was not satisfied from the evidence that the contract was for the benefit of the minor so as to be enforceable either civilly or criminally against him, he being only 14 years of age, as stated above. The matter was referred to the Attorney-General, and on the 7th inst. Mr. *Barclay-Lloyd* contended that the contract was a valid one, being for the benefit of the minor and cited in support of his contention *Fick and Others v. Rex* ([1904] O.R.C. 25). The Court referred to Tambyalis' *Digest of the Law of Contracts*, No. 160, which refers to the Ceylon Ordinance 11 of 1865. The law is laid down as follows: "The liability of a minor to punishment for desertion under the ordinance depends upon the age or mental and bodily capacity of the minor. The mere fact of minority will not relieve him from responsibility. In the case of *Alagan v. Alagy*, the CHIEF JUSTICE (Sir BRUCE BURNSIDE) referred to a case in Ramanathan's Reports in which the dictum of CLARENCE, J., was to the effect that undoubtedly a minor may enter into a contract of service so as to render himself liable to the statutory punishment for desertion; but this assumes that the minor is old enough to comprehend the situation and its circumstances."

As the evidence on the record was very meagre the Court referred the matter back to the special justice of the peace for further information as to (1) the exact terms of the contract, (2) the mental development of the accused, and (3) whether the rate of wages was that generally paid for work of the same description in the district. The special justice of the peace has taken further evidence and the employer of the accused makes an affidavit in which he states, "the boy's father owed me £3 and the boy promised to work for ten shillings a month until the amount was paid." It appears therefore that he really received no wages at all; the amount which it was stated he received being retained by his employer for a debt which he does not owe, as he is in no way liable for the debts contracted by his deceased father. The contract therefore is clearly not for his benefit and is consequently void. That being so no proceedings can be taken in respect of it, and the conviction and sentence must be quashed. I would add that when criminal proceedings

are taken against minors under the Masters and Servants Ordinance full particulars on the three points on which this case was referred back to the special justice of the peace should appear in the record.



REX v. LAPIERRE AND ANOTHER.

1905. July 7. FAWKES and WARD, J.J.

Criminal procedure.—Trespass.—Law 11 of 1899, sec. 1.

The expression "private property" in Law 11 of 1899, is used in contradistinction to property to which the public have a common right of user; consequently the property of the Crown, which is not subject to such a right of user, falls within the meaning of the term.

A person found in a hut in a native location on Crown land is not liable to a prosecution under Law 11 of 1899 simply because he has not obtained permission from the Native Commissioner.

The accused were charged before the Relieving Resident Magistrate of Thaba 'Nchu with contravening sec. 1 of Law 11 of 1899, in that they did wrongfully and unlawfully and without lawful reason, enter upon private property without the knowledge or consent of the owner or occupier, to wit, the Thaba 'Nchu native location, without the permission of the Native Commissioner. The evidence showed that the two accused were found in the hut of a half-caste woman in the Thaba 'Nchu location. The location ranger stated that he had not given these men permission to be in the location. There was no evidence that the occupier of the hut did not consent to their being there.

The resident magistrate dismissed the charge as he had a doubt whether a location, being Crown land, could be taken to be private property.

The Attorney-General brought this case in review under section 6 of Ordinance 38 of 1903.

Barclay Lloyd, for the Crown.

FAWKES, J.: The expression "private property" in Law 11 of 1899 is used in contradistinction to property to which the public have a common right of user; consequently the property

of the Crown which is not subject to such a right of user by the public is within the meaning of the term "private property" as used in the law. But a person found in a hut in a native location on Crown land is not liable to a prosecution under Law 11 of 1899 simply because he has not obtained the permission of the Native Commissioner. Once a hut has been allowed to be erected in a location, persons passing over recognised roads or paths to get to such huts for purposes not unlawful are not trespassers under Law 11 of 1899.

WARD, J., concurred.



ZWEIBACK v. HERBST.

1905. July 11. FAWKES and WARD, J.J.

Magistrate's court.—Appeal.—Reopening case.

H obtained judgment by default against Z in the magistrate's court. Z did not appear and no evidence was led. Z subsequently appealed. *Held*, that the appeal must be dismissed, as Z had not exhausted his remedies; his remedy being first to apply to the magistrate to reopen the case.

This was an appeal from a decision of the Resident Magistrate of Edenburg, given at the periodical court at Trompsburg.

The respondent (plaintiff in the court below) sued appellant (defendant in the court below) for the sum of £9, 10s. for board and lodging and for the use of two rooms. The appellant did not appear at the trial, and the magistrate, upon the summons and account annexed thereto and without calling any evidence, gave judgment provisionally under Rule 28 of the Rules of the Resident Magistrate Court for the respondent for the amount claimed. From this judgment appellant appealed.

A. Fischer, for respondent: The appeal would not lie because the judgment was merely provisional, the proper course was for appellant to have applied to the magistrate to have the case reheard under Rule 52 of Schedule B of Ordinance 7 of 1902. In any case the proceedings should have been for review under Rule 90 of the High Court Rules.

Hertzog, for appellant: Rule 90 did not apply and Rule 52 could not be applied, as no evidence was taken by the magistrate.

FAWKES, J.: This Court will not entertain an appeal until the party appealing has exhausted all his remedies in the court below. In this case the appellant might have applied to the magistrate to reopen the case. The fact that no evidence was

taken was not a bar to this being done, as when the record was read over and there was no evidence to support the claim, the appellant would have been entitled to have asked for absolution from the instance, or to have the plaintiff's claim dismissed. If he considered the judgment of the magistrate, on re-hearing, wrong he was then entitled to appeal to the High Court. As matters stand the appeal is premature and must be dismissed with costs.

WARD, J., concurred.

Appellant's Attorney: *J. P. van Zyl*; Respondent's Attorney: *C. J. Reitz*.



COETZEE v. COETZEE.

1905. July 11. MAASDORP, C.J., and FAWKES and WARD, J.J.

Husband and wife.—Divorce.—Connivance.

Plaintiff and defendant, who were man and wife, lived in a single room.

On the 7th May, 1904, defendant went out in the evening and returned a few hours later with two strange men. On entering the room with the strangers, she rebuked plaintiff for being always at home and suggested that he should go out and play billiards. Plaintiff left the room, entered the adjoining room and in the company of two other persons watched, through holes and cracks in a wooden partition, what was taking place. Adultery having been proved the Court raised the question whether plaintiff had not connived at the adultery. *Held* (WARD, J., dissenting), that plaintiff by his act in leaving the bedroom, deliberately made an opportunity, intending that adultery should be committed, and in consequence he was not entitled to a decree of divorce.

This was an action brought by the husband for a decree of divorce on the ground of his wife's adultery. It appeared from the evidence that the parties were married at Reddersburg on the 9th April, 1894. In May, 1904, they lived in a single room in a house in Monument Road, Bloemfontein. Quarrels had taken place between the parties in consequence of the wife's keeping company with other men. On the 7th May, 1904, the defendant left the house at about 7 P.M. and returned about 9 P.M. accompanied by two strangers. On her entering the room she told plaintiff that he was always moping about and suggested that he should go out and have a game of billiards. To avoid a further quarrel plaintiff immediately left and went to his next door neighbours and asked two persons to be witnesses to what happened in his room; this was done through cracks and holes in the board partition, and defendant was then seen to commit adultery with one of the two strangers she had brought home with her.

Upon these facts the Court raised the question whether there
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had not been such connivance on the part of the plaintiff as would disentitle him to the relief prayed for.

Borckenhagen, for the plaintiff, referred to *Maasdoorp, Institutes of Cape Law*, vol. 1, 85; *Browning, Marriage and Divorce*, p. 134; *Seaward v. Seaward* (1 Searle, 347); *Weatherley v. Weatherley* (Kotzé, 66).

Cur. adv. vult.

FAWKES, J: Although the act of adultery has been clearly proved the evidence disclosed facts which raises the question as to whether the petitioner by his conduct connived at the act of adultery upon which he now bases his claim for divorce. From the evidence it appears the parties lived in a single room which was divided from the adjoining house by a thin partition, and everything which occurred in the one room could be seen and heard in the other, owing to large cracks and holes in the boarding with which the partition had been repaired. The respondent left her husband in their room about 7 P.M. on the day in question and returned at 9.30 P.M. accompanied by two men, strangers to the petitioner. These two men were more or less under the influence of liquor. On entering the room with these two men the respondent said to her husband, "You had better go and play billiards. I don't know what has happened to you, you always stick in the house." The petitioner made no reply and took no notice of the two men, but immediately left his wife with these two strangers and entered the next house, occupied by a Mrs. Bate and Miss van den Heever, and asked these two ladies to be witnesses of what occurred in his room. The petitioner then watched with his two neighbours through the partition for two and a half hours until they saw the act of adultery completed. They then went to the petitioner's room and surprised the respondent. In his evidence the petitioner stated that he had previously suspected his wife and that he had on previous occasions driven men out of the house.

Upon the doctrine *volenti non fit injuria*, if the petitioner by his own acts connived at the act of adultery he is the author

of his own wrong and will be refused the relief he seeks. What then is meant by connivance? Lord WENSLEYDALE in his judgment in the case of *Gipps v. Gipps* (33 L.J., P. & M. 161), on the subject of connivance says: "Connivance excuses on the principle of *volenti non fit injuria*. To constitute it there must be corrupt intention as laid down upon full consideration of the authorities in the case of *Phillips v. Phillips* (1 Rob. Ecc. Rep. 144), which was acted upon by Sir CRESWELL CRESWELL in the case of *Glennie v. Glennie and Bowles* (32 L.J. Pro. M. and A. 17), when he said that to prove connivance it is necessary to show not only that the husband acted in such a manner as that adultery might result, but also it must be proved that it was his intention that adultery should result." In the case of *Weatherley v. Weatherley* (Kotzé, 66) Mr. Justice KOTZÉ in his judgment states: "Now connivance means where the plaintiff by his acts and conduct has either knowingly brought about or conduced to the adultery of his wife, or when he has so neglected or exposed her to temptation as, under the circumstances of the case, he ought to have foreseen would, if the opportunity offered, terminate in her fall. Here then if the wife commits adultery he will be taken to have acquiesced in it, and upon the principle *volenti non fit injuria* he is the author of his own dishonour. So when the plaintiff, having become aware of an improper intimacy existing between his wife and the co-respondent remains passive and permits the intimacy to continue, taking no steps to protect his wife and to avert the coming danger, he will be held to have connived at or consented to her subsequent adultery. There must therefore be a corrupt intention proved on the part of the plaintiff, otherwise he will not be debarred from obtaining a decree." Now, referring to the facts in the present case, do they show that the plaintiff intended the act of adultery to be committed and that he not merely permitted but made the opportunity for the commission of the offence? A man is entitled, when he suspects his wife, to watch her and even to leave open opportunities for her to commit adultery, but he must not take any active steps to make an opportunity; if he does so he becomes a consenting party. The conduct of the petitioner in leaving the room at his wife's request

without a word of remonstrance or any attempt to rid the house of these two strangers, and permitting them to remain alone with his wife in the room they used as a bedroom points, I think, to an intention on his part that the act which he at once went to witness from the next room should be carried out. His subsequent watching and his call to the two women to assist him as witnesses and his remark : "I had to let the case go on so as to prove it," satisfies me that he was anxious to get proof of adultery for a divorce, and in absenting himself at the request of his wife he deliberately permitted his home to be polluted. Had the plaintiff remained where he was the adultery could not have then taken place. I think the plaintiff by his act in leaving the bedroom deliberately made the opportunity, intending that adultery should be committed. Under these circumstances I think he connived at the offence and has disentitled himself to any relief from this Court.

MAASDORP, C.J. : I concur with FAWKES, J.

WARD, J. (dissenting): This is an action brought by the husband against his wife for divorce on the ground of her adultery. The parties were married at Reddersburg in 1894, and afterwards lived there for some time. They thereafter resided at Smithfield and Winburg, and finally came to live in Bloemfontein, where the adultery is alleged to have been committed with two men whose names are unknown. The defendant had entered an appearance, but failed to file a plea. She did not appear nor was she represented at the trial.

The evidence of the plaintiff was to the effect that prior to the 7th May, 1904, the date on which the adultery is alleged in the declaration to have been committed, quarrels had taken place between him and his wife in consequence of her keeping company with other men; that on the night in question she had left the house where they lived in Monument Road about 7 P.M., and that she returned about 9 P.M., accompanied by two men. The plaintiff was at home when they arrived, and the defendant complained that he was always moping about, and that he ought to go out and have a game of billiards. The

plaintiff says that in order to avoid a row, which had been frequent of late, he got up and went out, and that while he was on the doorstep the thought occurred to him that he would watch what the defendant was up to with the men, as he suspected her of being unfaithful to him. It may be mentioned that the house in which the parties resided consisted of a single room separated from the adjoining house, occupied by persons of the name of van den Heever, by a board partition, in which there were cracks and holes. The plaintiff accordingly went to Mrs. van den Heever and asked her permission to be allowed to watch what was going on in his own house through the cracks and holes in the partition above referred to. This was granted, and the plaintiff and Mrs. van den Heever's daughters took up the position of watchers. From their evidence I am satisfied (1) that adultery was committed by the defendant with one at least of the two men, and (2) that, from the defendant's language and conduct on that occasion, she was at that time an utterly depraved and abandoned woman. There was also the evidence of one of the van den Heevers that the defendant was in the habit of receiving men at her house in her husband's absence. Under ordinary circumstances the plaintiff, having satisfied the Court as to the commission of the adultery, would be entitled to his decree of divorce. In matrimonial cases, however, such relief will not be granted if the plaintiff has himself been guilty of certain misconduct. In South Africa the only forms of misconduct which will deprive a plaintiff of the right to a divorce are: (1) Adultery on the part of the plaintiff; (2) condonation or (3) connivance. In England there is a fourth, namely, conduct on the part of the plaintiff conducing to the defendant's adultery. This last-mentioned disqualification arises from sec. 31 of the Divorce Act of 1857. Its history is traced by Mr. Justice JEUNE, Judge President of the Court for Divorce and Matrimonial Causes, in *Symons v. Symons* (1897, Probate Division, 175 and 176). It is not, however, a ground for refusal of divorce in South Africa. See the remarks of the CHIEF JUSTICE of the Cape in *Hasler v. Hasler* (6 Shiel, 415), and I only mention it here lest too much stress might be laid on English cases which relate to this English disqualification.

In this case there is no question raised nor is there any evidence to show that the plaintiff was himself guilty of adultery or condoned his wife's misconduct. The only question that the Court has to decide is this: Was the plaintiff guilty of conniving at his wife's adultery by going out and leaving his wife and the two men in the room as already described? We labour under the disadvantage of not having access to the old ecclesiastical reports of Haggard and others, more especially in not having the report of the case of *Phillips v. Phillips* (10 Jurist, 829), the leading case on this subject, where the whole question is discussed and all the authorities cited and reviewed; but the principle deduced by the Court as applicable to that case is, that where there is no corrupt intention proved on the part of the husband, he is not barred from his remedy. See Bishop on *Divorce*, vol. 2, sec. 6, n. 3.

There are many cases during the last fifty years to which I have been able to refer, in which connivance has been pleaded as a bar to relief, but so far as I have been able to ascertain, in only three cases has that plea been successful. These cases are *Gipps v. Gipps* (33 L.J., P. & M. 161), where the plaintiff's wife having committed adultery and the husband having brought an action for divorce and damages against the wife and the adulterer, the plaintiff allowed judgment to go against him in consideration of the payment of a certain sum agreed upon between him and the adulterer. The wife afterwards was guilty of fresh acts of adultery with the same man, and the House of Lords held that the husband was not entitled to a divorce founded on these fresh acts. I would remark with regard to this case that the reasons given in the House of Lords by the different Law Lords are not based on the same principles. In *Allen v. Allen* (30 L.J., P. & M. 2) the downfall of the wife was brought about by a conspiracy between the husband and the seducer. In *Baylis v. Baylis* (36 L.J., P. & M. 89), the jury found that the downfall of the wife was occasioned by the wilful separation of the husband from her, and by his placing her in a position where he must have been aware that in the ordinary course of things her downfall would take place, in fact that he wished her fall in order to get rid of her.

The matter is quite different where a husband, having good grounds for suspecting the fidelity of his wife, watches her. In *Sugg v. Sugg* (31 L.J., P. & M. 43), Sir CRESWELL CRESWELL says: "In a case of this sort where you have a woman leading an abandoned life, you must get evidence of her guilt before you can found a suit upon it. If a husband believing his wife to be chaste were to attempt in any way to place her in a situation where she would be likely to fall, if he were to induce a man to set about to seduce and defile her, nothing would be more base and detestable than such conduct or more dangerous to society. But it is a very different thing to obtain evidence against a woman who is living as an abandoned prostitute." Lord PENZANCE, in *St. Paul v. St. Paul* (38 L.J., P. & M. 59), where he is dealing with the English Act, says: "The statute says conduce to the adultery, but in reflecting upon these words of the statute the conclusion at which I have arrived is this, that the legislature did not mean that a husband should be deprived of his remedy if his conduct had conduced to any particular act of adultery after his wife's first fall from virtue, but that it meant that his remedy should be withheld from him if he had so acted as to bring about the fall of his wife or the loss of her virtue. What the legislature appears to me to be pointing at under the word adultery is the lapse from virtue of the wife," and lower down, "it seems to me the neglect which is followed by a subsequent act of adultery after the loss of virtue by the wife is not the neglect which the statute meant, it must be that neglect which conduced to the fall of the wife." In the quite recent New York case of *Petter v. Petter* (28 N.Y. Supp. 1067), it is laid down that a husband who permits his wife, after his suspicions are aroused, to carry out her manifest purpose of meeting one who proves to be her paramour, does not thereby prevent himself from obtaining a divorce under the New York Code which provides that he shall not be entitled thereto when the offence was committed with the connivance of the husband. Bishop, in his work already referred to, vol. 2, sec. 9, lays down: "When a husband suspects his wife of infidelity to his bed, he may watch her and even leave opportunities open for her in order to obtain proof of her guilt; but, for this purpose, he must neither lay

temptations in her way, nor provide the opportunities." "It is true," remarks Lord STOWELL, "a husband is not barred by a mere permission of opportunity for adultery . . . but it is one thing to permit and another to invite . . . that the husband is to contrive the meeting, that he is to invite the adulterer, then decamp and give him the opportunity, I do think amounts to legal prostitution."

I am of opinion that the conduct of the plaintiff in the circumstances of this case falls short of connivance, and I am further of opinion that what he did in leaving the room when he must have known that adultery would almost certainly follow, was a permission and not a providing of an opportunity of adultery, and the plaintiff should not be deprived of his remedy.

Judgment for defendant.

Plaintiff's Attorneys: *Botha & Titley.*



PARKER v. PARKER.

1905. July 20. FAWKES and WARD, J.J.

Husband and wife.—Domicile.—Divorce.

A wife sued her husband for restitution of conjugal rights failing which for divorce on the ground of malicious desertion. The husband had been sued edictally but did not appear, and his whereabouts were unknown. It appeared that his domicile of origin was the Cape Colony, but he had lived for a little while both before and after the war in this colony. *Held*, that he had not acquired any domicile here and consequently the wife was not entitled to bring her action in this Court.

This was an action by the wife for restitution of conjugal rights failing which for divorce, on the ground of malicious desertion.

The husband, whose whereabouts were unknown, had been sued by edictal citation but had not appeared. The evidence on behalf of the plaintiff was to the effect that the parties were married on the 7th December, 1896, at the English church at BooySENS, a suburb of Johannesburg. After the marriage they resided for three or four months on the farm Helvetia, in the Lydenburg district, and then returned to Johannesburg, where they lived for some six months. A visit was paid to some friends in Colesberg, which lasted another six or seven months. On their return to Johannesburg they lived in the Masonic hotel, but had to leave after four months because the husband could not meet his hotel account. They then lived in a house lent them by a friend, when the plaintiff supported both her husband and herself by doing fancy work. Some time after the plaintiff left of her own accord and without obtaining her husband's permission, and took up her abode with her parents at Winburg. Shortly before the outbreak of the late war plaintiff sent for her husband to come to Winburg; he came, and after some six weeks joined the Winburg commando and went

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to the front. Subsequently he was captured and sent to Ceylon as a prisoner of war. On his return from Ceylon he joined the plaintiff at Winburg, where she was then living and earning a livelihood by dressmaking. After three weeks had elapsed plaintiff gave him some money to go to Johannesburg in search of employment. Defendant was a prospector; his parents lived in Johannesburg but originally they came from Colesberg in the Cape Colony. The husband stayed away for eight months and then returned to Winburg when the parties had some disagreement and defendant left again, as he said, for Johannesburg. Some two years had now elapsed and plaintiff had not heard from him since he left Winburg. Before the war the plaintiff and defendant were living on a farm belonging to plaintiff's father in the Winburg district, for which defendant paid about £12 per annum.

Borckenhagen, for the plaintiff.

Defendant in default.

FAWKES, J.: The plaintiff is only entitled to bring her action in this Court if her husband was domiciled here. Now the husband's domicile of origin seems to have been the Cape Colony. He may have acquired a domicile of choice in the Transvaal, but I am satisfied upon the evidence that he never acquired one here. The Court has to be careful in these cases, because the courts of the country where the husband is really domiciled might refuse to recognise the proceedings before this Court, and much as the Court may sympathise with the plaintiff it has no option but to refuse to grant the order asked for on the ground that it has no jurisdiction.

WARD, J.: I concur.

Plaintiff's Attorney: *J. Craig*.

EX PARTE JOUBERT.

1905. July 20. FAWKES and WARD, J.J.

Wills.—Alteration of.—Power of court.

An application by a surviving spouse for leave to alter the distribution of property under the mutual will of himself and his pre-deceased spouse, refused.

The petitioner in this case, who had been married in community of property to his deceased wife, had made with her a joint will under which the children, who are minors, were to inherit all the immovable property, subject to the survivor's usufruct, the whole of the movable property being bequeathed to the survivor. At the date of the will the latter was almost as valuable as the immovable property but had since, in consequence of losses suffered during the war, very much depreciated in value. The immovable property consisted of three farms situated in the Harrismith district. The petitioner now asked the Court to confirm a liquidation and distribution account which differed from the distribution as directed by the mutual will in the following respects: Instead of all three farms being awarded to the children they were to receive only two farms which were to become their absolute free and unencumbered property, not subject to the otherwise lifelong usufruct in favour of petitioner which he agreed to waive; petitioner was prepared and undertook to give immediate transfer and to pay transfer duty and costs of transfer, the petitioner to use and occupy the farms for the benefit of the minors until their majority; the third farm was to become the absolute property of the petitioner, who was also to acquire the movables in the estate, the petitioner undertaking to pay the debts and administration expenses of the estate and also the succession duty payable by the children. Owing to the altered circumstances since the late war the petitioner was not in a position to pay the debts and administration expenses and succes-

sion duty which he wished to do. If the provisions of the will had to be carried out, permission would have to be obtained to either sell or mortgage some of the property bequeathed to the children to pay half the debts and administration expenses together with succession duty. Petitioner wished to assist his children and therefore proposed a liquidation and distribution of the estate in the manner above set forth. Petitioner had neither adiated under nor repudiated the mutual will pending this application to the court.

Hill, for petitioner: The proposed distribution was clearly favourable to the minors and the Court, taking that into consideration, had the power to sanction the alterations asked for.

[FAWKES, J.: Why does your client not take his half share and then confer on the minors the advantages he now proposes?]

The children would then have to pay transfer duty and other charges.

[FAWKES, J.: The court does not sit to sanction arrangements to enable people to avoid paying taxes.]

[WARD, J.: You are asking the Court to make a new will for you.]

Petitioner did not want a new will (he wished the will to stand), but asked that the property be distributed in a manner different from that prescribed by the will.

[WARD, J.: If we made the order asked for the parties would not take under the will but under an arrangement sanctioned by the Court because certain of the parties were minors, but that would not relieve them from paying transfer duty and other charges.]

Application refused.

Attorney for petitioner: *G. A. Hill*.



BUKES v. THERON

1905. *July* 25. FAWKES and WARD, J.J.*Negligence.—Law agent.—Damages.*

B, a law agent, sued T in the magistrate's court for £2, 12s. 3d., for professional services rendered. T admitted liability but counter-claimed £20 in respect of a military receipt for the amount and of the value of £30—but which was reduced to bring the matter within the jurisdiction of the magistrate. The receipt had been given to T by an English officer on the 26th January, 1903, in respect of a horse, saddle and bridle with which, nearly two years previously, he had surrendered to the British during the late war. On the 27th January T handed the receipt to B to be sent to the Staff Officer of Receipts at Harrismith in support of a claim. B alleged that he wrote a letter on the 29th January forwarding the receipt, and produced a press copy of the letter. The letter however was unregistered and the military authorities stated that they never received the same. B did not keep a copy of the receipt. The magistrate found that B had acted negligently and gave judgment against him for the £20. *Held*, on appeal, that the facts did not disclose negligence on the part of B and that the magistrate's decision must be reversed.

The appellant sued the respondent in the court of the Resident Magistrate of Kroonstad for an amount of £2, 12s. 3d., being for work done by the appellant, a law agent practising in Kroonstad. The respondent admitted his indebtedness, but counterclaimed the sum of £20 in respect of a certain military receipt of the value of £30, but which was reduced to bring the matter within the jurisdiction of the magistrate.

On the 27th January, 1903, respondent handed to appellant a military receipt for £30 to be sent to the Staff Officer of Receipts at Harrismith. The receipt was given to respondent on the 26th January, 1903, by a certain Captain Craig in respect of a horse, saddle and bridle with which he had surrendered to the British during the late war. Respondent stated that he gave the receipt

to appellant for collection. Appellant stated that on the 29th January, 1903, he forwarded the receipt to the Staff Officer of Receipts at Harrismith and produced a press copy of the covering letter.

The magistrate found that the respondent had delivered the receipt to plaintiff for collection on the 27th January, 1903; that the plaintiff wrote the alleged covering letter to the Staff Officer of Receipts, but that there was no evidence to show that the receipt was inclosed within the letter or that the letter was duly posted or that it was registered. That plaintiff failed until the 14th September, 1903, to do anything further in respect to his instructions to collect the receipt, although his letter of the 29th January had not been acknowledged; and that respondent never obtained the receipt again from appellant.

The reasons for the magistrate's judgment were in the following terms:—

I found judgment for plaintiff in reconvention for the sum of £20 on the counterclaim, and for plaintiff in convention for the amount of costs admittedly due, £2, 12s. 3d., and ordered the plaintiff to pay the costs, on the following grounds: (a) plaintiff, as agent for defendant, received for collection a valuable document the property of defendant and is unable to return it; (b) the plaintiff did not exercise, in dealing with the receipt handed him by defendant, the proper care and diligence in the matter which the defendant was entitled to expect from his legal adviser, and thereby the defendant has suffered the loss of his property valued at £20; (c) Defendant admitted that the costs were due to plaintiff; (d) defendant, succeeding on his counterclaim, is entitled to costs more especially as he was willing to pay the plaintiff's claim on delivery of the receipt, and expressed such willingness previous to issue of summons.

Hertzog, for appellant.

A. Fischer, for respondent.

FAWKES, J.: The respondent claimed in reconvention in the court below damages for the loss of a military receipt which he had handed the appellant with directions to forward it to the Staff Officer of Receipts at Harrismith in support of a claim. The magistrate found for the respondent on the ground that

there was no evidence that the appellant had enclosed the receipt with the covering letter which he stated he had written and posted or that this letter had been actually posted, and that the appellant had not exercised proper care and diligence.

The respondent raised the further point that the appellant was liable in damages for negligence, even if he did forward the receipt, in not having kept a copy and in not having registered the packet when he posted it. The appellant in his evidence stated that he forwarded the receipt with a covering letter to the military authorities at Harrismith, and he produced his press copy book which showed a press copy of this letter; that the letter was written was not disputed. The appellant could not positively swear that the letter with the receipt had actually been posted, but he believed that in the ordinary course of business this had been done. The military authorities were asked for the receipt and stated they had not got it. As a fact we know many receipts they had received had been lost, and I do not understand that they actually denied that they had received the receipt in question.

The evidence of the appellant, which does not appear to have been questioned by the magistrate, raises, I think, the presumption that the covering letter with the document to which it refers was posted in accordance with the respondent's instructions—and there is no evidence to rebut this presumption; if it was posted the further presumption that it was received follows. Upon the question of negligence it must be borne in mind that there was nothing said and nothing in the receipt itself which would lead the appellant to suppose that it was a document of any great value. It was merely evidence in support of a claim; it was signed and given to the respondent and was dated two days previous to its being handed the appellant, and related to a transaction which had occurred during the war two years previous. There was no legal obligation upon the officer to give it, and presumably the motive which actuated him in signing the receipt after such a length of time would have led him to give another if the first miscarried; possibly a careful man would have kept a copy and have registered the postal packet in which the receipt was enclosed; but the question is whether this neg-

lect constitutes such negligence as would entitle the respondent to damages for any loss which might be thereby occasioned. Having regard to the nature of the instrument and the circumstances under which it was forwarded, I do not think there was any such negligence on the part of the appellant.

Mr. Bukes was asked to forward the document and he carried out his instructions. If the letter was lost in the post or by the military authorities, he cannot be held to have been so negligent as to be liable for damages. In any case the Court would have been compelled to send the case back to the magistrate to take some evidence to enable him to assess the damages. He seems to have assumed that the document was of the face value of £30, and based his judgment on that assumption.

The magistrate's judgment on the claim in reconvention must be altered to one of absolution from the instance with costs here and in the court below.

WARD, J.: I concur. To take the last point first, namely, the amount of damage suffered by the respondent. Before I could accept the amount fixed by the magistrate the case would have to be referred back to him to take evidence on the following points: (1) Whether the military authorities would accept receipts such as this one, which was given long after the transaction to which it relates, and (2) as to the amount in the pound paid in respect of receipts of this class, assuming the authorities had accepted it. In the view I take of this case, however, it is not necessary to fix the amount of damages.

The facts are that the respondent brought his receipt to the appellant to send to the proper authorities. It was an ordinary business transaction, and the presumption, until rebutted, is that the plaintiff carried out his instructions to write the letter, enclose the receipt and post it. In support of this presumption the appellant produces the book containing a press copy of his letters, and on the date in question there is a copy of a letter transmitting the receipt. Plaintiff further swears that he posted the letter. The only evidence to rebut this presumption is that some seven or eight months afterwards the military authorities

at Harrismith and Bloemfontein could not trace the receipt. This is altogether insufficient.

As regards the negligence charged against the plaintiff by reason of his not keeping a copy of the receipt and not registering the letter, I do not think these omissions amounted to negligence under all the circumstances. In my opinion the magistrate's judgment awarding respondent £20 should be altered to one of absolution from the instance with costs here and in the court below.

Appellant's Attorney: *J. P. van Zyl*; Respondent's Attorney: *C. J. Reitz*.



EX PARTE KRAUSE.

1905. August 8. FAWKES and WARD, J.J.

Advocate.—Admission.

K, an English barrister, an advocate of the Supreme Court of the Cape Colony and of the High Court of the South African Republic, and thus entitled to admission as an advocate in the Orange River Colony, was convicted in England of an attempt to solicit to commit the crime of murder in respect of a person resident in the Transvaal, and served his sentence of imprisonment. As a consequence of his conviction K was disbarred by the benchers of his Inn in England. No action was, however, taken in the Cape Colony, and he remained an advocate of the Supreme Court there. On the 20th January, 1905, the benchers rejected his petition for reinstatement. K then applied to the Supreme Court of the Transvaal for admission as an advocate, which application was granted on the 8th May, 1905. He now applied for admission as an advocate of the High Court of the Orange River Colony, alleging that his aforementioned offence was of a political nature.

Held, that the presumption was that a person convicted of a crime is unfit for admission as an advocate, but that this presumption may be removed by the circumstances which led to the crime, and that the Court in exercising its discretion would consider chiefly the facts disclosed at the trial and their bearing on the man's moral character. Upon the facts of the case, the Court granted the application.

This was an application for admission to practice as an advocate of the High Court.

The petition set forth that the petitioner was in 1893 called to the English Bar by the Honourable Society of the Middle Temple, that in the same year he was admitted and enrolled as an advocate of the High Court of the late South African Republic and was so enrolled at the date of annexation of the Transvaal by his Majesty's Government. In 1899 the petitioner was admitted as an advocate of the Supreme Court of the Cape of Good Hope and was still enrolled as such. That on the 18th January, 1902, during the late Anglo-Boer war, and while detained as a prisoner

of war in London, the petitioner was convicted and sentenced to two years imprisonment for an attempt to solicit one Broeksma to murder one Foster, in consequence whereof he was disbarred by the benchers of the Middle Temple. That the petitioner's offence was of a political nature, and that in giving the instructions contained in the two letters on which the indictment against him was based and upon which he was convicted, he was actuated by motives of patriotism and love for his country, and of solicitude for the safety and honour of his countrymen.

On the 20th January, 1905, the benchers of the Middle Temple had rejected a petition for reinstatement as a member of that honourable society. On the 8th May, 1905, the petitioner had been admitted as an advocate of the Supreme Court of the Transvaal.

Hertzog, for the petitioner.

Cur. adv. vult.

FAWKES, J.: The petitioner prays for admission as an advocate of this Court under section 11, sub-section (a) of Ordinance 4 of 1902. Having been admitted as an advocate of the Supreme Court of the Cape of Good Hope there is no doubt as to his possessing the necessary qualification, but a question is raised (by facts set out in the petition itself) whether Dr. Krause is a fit and proper person to be admitted to practise as a barrister, and we therefore thought it right to reserve our decision.

The admission of practitioners who possess the necessary qualifications is left to the discretion of the Court, which must be satisfied that the applicant's character is not such as would unfit him for the discharge of the duties and responsibilities of an advocate. Notice of the application as required by the rules has been given to the Attorney-General, and as the Attorney-General has not appeared we may take it that no opposition is raised to Dr. Krause being admitted as an advocate of this Court.

Dr. Krause, who was a member of the English Bar as well as that of the Cape, was living during the latter end of the war under parole in England and, in consequence of a certain letter

he wrote while in England to a person in the Transvaal, he was indicted in England for the crime of attempting to solicit a murder and was convicted and sentenced. Upon this conviction the benchers of his Inn, the Middle Temple, disbarred him. He has applied to be reinstated by his Inn and they have refused to reconsider their decision. No action, however, was taken at the Cape upon this conviction and he remains at the present moment a member of the Bar of its Supreme Court. In addition he has also been lately admitted as an advocate of the Supreme Court of the Transvaal, and we have had the advantage of perusing the judgments given by the judges, which explain their reasons for admitting him notwithstanding this conviction. This Court is no longer subject to an appeal to that of the Transvaal and we cannot therefore avoid our responsibility by holding that a decision of that court is binding upon us, but I need not say that any decision of the Supreme Court of the Transvaal must have the greatest possible weight when the point to be decided is, as in the present matter, identical. Again, I cannot help being sensible of the ridiculous anomaly we should create by refusing admission on the ground of unfitness of character to a person who is considered fit to practise as a barrister, and is entitled so to practise, both in the Transvaal and at the Cape of Good Hope. Still we are bound to exercise our discretion on the merits, and as the matter is of considerable importance we should give the reasons for our decision.

The only question which arises is whether the applicant by reason of the acts which led to his conviction is rendered unfit for admission as an advocate. The presumption is that a person convicted of a crime is unfit for admission as an advocate, but this presumption may be removed by the circumstances which led to the crime, and in exercising our discretion we are not so much concerned with the conviction itself as with the facts disclosed at the trial, and the extent to which they affect the man's moral character. It is easy to imagine cases where a man convicted of a crime returns to the world, having expiated his offence by suffering the penalty, with no such taint on his moral character as would unfit him from pursuing an honourable profession.

Dr. Krause was convicted of a very serious crime, he has paid

the penalty, and it is needless for me to comment upon an act which every dispassionate person must condemn, and which no doubt Dr. Krause now seriously regrets. Unhappily war was then raging and Dr. Krause, who had been made a prisoner, read suggestions made in a newspaper article written by a Mr. Foster in Johannesburg that the Boers who remained in the field should be treated as bandits and robbers and not as belligerents and should be tried and shot when captured, and upon this he wrote the letter which formed the subject matter of the indictment.

In judging how far Dr. Krause's character for honesty and uprightness, which is so necessary in the advocate, has been destroyed by the act which led to his conviction, I think we should take into consideration the motive which actuated him and the intense excitement and the storms of violent passions which the war had raised, and which, unhappily, accompany every national encounter. Dr. Krause had no personal feeling against Mr. Foster nor had he any private interest in his destruction. His conduct, which cannot be too severely condemned, was due to a notion that he was assisting his country in the struggle for their freedom, and it was the outcome of passionate excitement occasioned by the war; that, happily, is a thing of the past, never I believe and trust, to recur.

I do not wish to express any opinion upon the point raised in the petition that the crime was of a political nature. I prefer to base my decision on the bearing that the facts proved at the trial have as to the moral character of the petitioner. These facts do not, I think, disclose motives of a mean, sordid or personal nature. The letter was written in time of intense excitement caused by a national war, and the writer was provoked by a violent and intemperate newspaper article.

I agree with the opinion expressed by the judges in the Transvaal that the circumstances do not call upon us to debar the petitioner from following here the honourable profession of which he is still a member in the Cape of Good Hope.

WARD, J.: This is a petition which came before us on Tuesday last, for the admission of the applicant to practise as an advocate of this Court. The second paragraph of the petition

states that the petitioner was admitted as an advocate of the Supreme Court of the Cape Colony and still stands enrolled as such. If this were all the case would present no difficulty, as it is expressly provided by Ordinance 4 of 1902 that advocates of the Supreme Court of the Cape Colony are eligible for admission to practice as advocates of this Court. The fourth paragraph of the petition, however, sets out that in 1902 the petitioner was convicted in London of an attempt to solicit to murder, and sentenced to two years imprisonment, and that in consequence of this conviction he was disbarred by the benchers of the Middle Temple, of which Inn he was a member and that they have refused to remove the bar although the petitioner has applied to them to do so during the present year. It is further stated in the petition that in May last the Supreme Court of the Transvaal admitted the petitioner to practise as an advocate of that court. This, as appears from the judgment of the court, was done after consideration of all the facts of the case. We have therefore two authorities, whose opinions are entitled to the greatest weight, arriving at opposite conclusions with regard to this case. In cases of this kind, where this Court has to exercise a discretion, I need hardly say that it must do so on the facts and that it is not open to us to blindly adopt the decision either of the benchers of the Middle Temple or of the Supreme Court of the Transvaal. When so eminent authorities differ the decision may not be an easy one; still we must decide according to our light whatever the consequences of that decision may be. And I think it convenient at the outset to define the attitude the Court should take up when persons already admitted as practitioners in this Court have been convicted of a crime.

In my opinion not every conviction is a ground for disbarment or striking off the roll or refusal of admission. On the contrary, it is the duty of the Court to investigate the nature of the crime, and the circumstances of its commission and, unless satisfied that these render the person convicted unfit to become or remain a member of the legal profession, it should not refuse admission, disbar or strike off the rolls as the case may be. It appears to me that this is the sole test that we have to apply, and we must investigate the proceedings at the criminal trial,

not for the purpose of criticising those proceedings but to satisfy ourselves as to the nature and circumstances of the crime. One hundred years ago it meant social ostracism not to send a challenge in certain circumstances while the sending such a challenge was a serious crime. Lord MANSFIELD after sentencing a member of parliament for such an offence consoled the prisoner, who was bewailing his fate, by observing: "many good men have done as you have done"; in such a case I do not think we should disbar. Numerous cases are also found in the books dealing with this matter. In *Re a solicitor* (61 L.T. 842), Baron POLLOCK says, "the mere conviction is not binding upon the court in a case of this kind, but the court can and may and ought to enter upon and weigh all the facts of the case, including any extenuating circumstances that exist in favour of the solicitor," and Lord Justice LOPES in *Re Wease* (69 L.T. 522) says, "it is perfectly clear that the mere fact that a person has been convicted of a criminal offence does not make it imperative on the court to strike him off the roll. There are criminal offences and criminal offences. For instances we can imagine an assault of such a disgraceful character that it would make it incumbent on the court to strike the attorney off the roll, on the other hand one can imagine an assault arising to some extent out of a quarrel of a much less serious character, where in all probability the court would not think it its duty to interfere. Again there are libels and libels, some of which would compel the court to act under its ample powers, others where the court would hesitate before it so acted."

This being the attitude the Court should take up in such matters, the question is, How should we decide this application, having regard to all the circumstances of the case? Unfortunately a report of the criminal proceedings has not been put in, nor have we any report of what took place before the benchers when the petitioner was disbarred. As a rule this would be necessary, but in view of the full statement of the facts in the various judgments delivered by the learned judges in the Transvaal, I do not think there is any impropriety in accepting the facts as stated therein and in this way obviating the delay involved in obtaining the reports referred to.

Shortly, the facts seem to be that a Mr. Douglas Foster, formerly legal adviser to Lord Roberts, but who in 1902 was acting as correspondent to a London newspaper, advocated in his communications to the paper in question that the Boer forces still in the field should no longer be recognised as belligerents, but should be treated as bandits and robbers and, when captured, shot. The petitioner, then a Boer prisoner of war in London, to whom Mr. Foster was but slightly known, read these communications and was naturally enough stung by the harshness, not to call it by a worse name, of the policy advocated by Foster. He wrote the following letter to a friend :—

“I enclose herewith cutting from the *Pall Mall Gazette*, being a letter written by . . . you know the man. It is your duty to inform our people of this, so that they can deal with him in a lawful manner, and either shoot him or make him harmless. He is doing the cause a great deal of harm, and is nothing more than a common criminal publicly inciting to murder.”

This was followed up by two letters to the same effect. Upon these letters the petitioner was indicted for attempting to solicit the commission of murder and found guilty. It is not the province of this Court, and would indeed be an impertinence on its part, to criticise that verdict. All that we have to do is to endeavour to ascertain whether the letter in question shows such a moral turpitude (to use the language of an American Code) as to render him unfit to be admitted as an advocate.

Taking into account the provocation received, the circumstances in which the petitioner and his friends were situated at the time, the spirit of bitterness which was abroad and the other circumstances already referred to by the learned CHIEF JUSTICE of the Transvaal and my learned brother, I cannot bring myself to believe that they do. Two circumstances render it easier for me to arrive at this decision. The first is that no steps have been taken to have the petitioner disbarred at the Cape, and the second that no opposition has been made to his admission here, although notice of the application has been served upon the Attorney-General as head of and representing the Bar of this colony.

Considerable stress seems to have been laid upon the political

character of the petitioner's offence when his application was before the Supreme Court of the Transvaal. I wish to guard myself against being supposed to proceed upon that ground, and for two reasons; first, because I am very doubtful whether the offence of the petitioner can be brought within any of the meanings of the ambiguous expression "political offence," and secondly, because I do not think it advisable for a court of law to draw distinctions between political and other offences. That no such distinction can be made seems to me to be clear from van Zyl's *Judicial Practice* (2nd ed. 757), from which it appears that an attorney was struck off the rolls of the Supreme Court of the Cape Colony in 1900 and another in 1901 for high treason, which is clearly a political offence. From the *Cape Times Law Reports* it also appears that two more attorneys were suspended in 1902 for the same offence.

In my opinion it is not expedient to lay down any rule as to the class of offence which would be a bar to admission beyond this, that the circumstances must not display such moral turpitude as would render the person convicted in the opinion of the Court unfit to be admitted to the ranks of so honourable a profession as that of advocate.

The petitioner was admitted.

Attorney for Petitioner: *J. W. G. Steyn.*

HUMPHRIES & LAMMAS v. THE TOWN COUNCIL OF BLOEMFONTEIN.

1905. August 10. FAWKES and WARD, J.J.

Municipality.—Expropriation.—Ordinance 21 of 1904.—Law 1 of 1899.—Proclamation 11 of 1902.

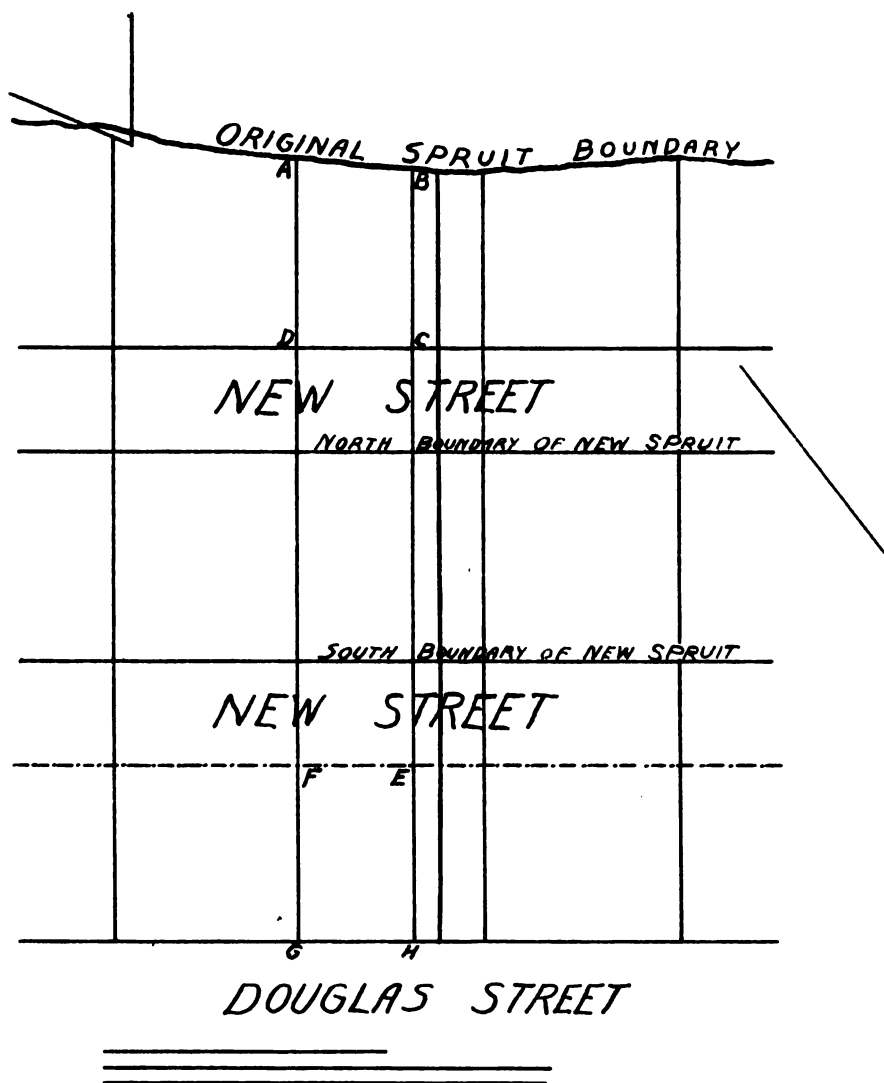
By Ordinance 21 of 1904 the defendants were empowered, subject to payment of compensation, to expropriate land or any rights in respect thereof in Bloemfontein for the purpose of carrying out the works necessary for or incidental to the widening, straightening and bridging of the watercourse running through the city. Defendants accordingly expropriated certain portion of an erf belonging to plaintiffs. Plaintiffs claimed that a larger portion had been expropriated than was necessary for the proposed works, and prayed for the expropriation to be set aside and for an interdict restraining defendants from interfering further with their land, and damages. The city engineer in his evidence stated that the expropriation was absolutely necessary. *Held*, that the Court was bound to give effect to the clear meaning of the Ordinance. That unless plaintiffs could show that the city engineer's evidence was not given as a *bond fide* opinion and that the land was in reality not required, they could not succeed. Judgment was given for defendants.

In consequence of a flood which took place in Bloemfontein early in 1904, it was decided to enlarge the watercourse running through the city. To be able to effectually accomplish this object Ordinance 21 of 1904 was passed, which provided, *inter alia*, that the Town Council should have the power, subject to payment of compensation, to expropriate land or any rights in respect thereof for the purpose of carrying out the works necessary for or incidental to the widening, straightening and bridging of the watercourse.

On the 14th October, 1904, defendants, by a notice in the *Gazette*, purporting to act under the provisions of Ordinance 21 of 1904, Law 1 of 1899 and Proclamation 11 of 1902, expropriated

PLAN
OF ERF N^o 15 DOUGLAS ST
BLOEMFONTEIN

— Scale = 90 Feet = 1 Inch. —



certain erf in Douglas Street belonging to plaintiffs, for the purpose of the alteration of the Bloemspruit and the carrying out of the works necessary for or incidental to the widening, straightening and bridging of the watercourse.

Plaintiffs alleged that the whole erf in question was not necessary for the purposes mentioned, admitting however that 200 feet would be necessary; that they had protested against this expropriation; and maintained that the expropriation had been wrongfully and unlawfully done. In consequence whereof plaintiffs claimed an order (a) declaring the plaintiffs entitled to the full and free ownership and possession of the piece of land forming part of erf No. 15, Douglas Street; (b) declaring the expropriation by defendants null and void; (c) restraining defendants from further interfering with plaintiffs' rights to the land; (d) ordering defendants to pay £100 damages and costs. The defendants pleaded a general denial.

The position of the piece of ground in dispute can be more easily indicated by referring to the accompanying sketch. The figure A B H G represents plaintiff's property, and A B E F the portion expropriated. Plaintiffs admitted the necessity of expropriating D C E F, which includes 100 feet for the new waterway and a street of 50 feet on either side, but claimed that the figure A B C D was not necessary or incidental to the widening, straightening or bridging of the watercourse.

The city engineer stated in his evidence that it was absolutely necessary for the purpose of carrying out the scheme to expropriate the ground in dispute; the old spruit had to be filled up or else it could not be properly drained. The purposes for which the expropriation of the ground in question was necessary were, drainage, sanitary reasons and as a depositing site. It also appeared that the plaintiffs had offered to fill up the old spruit or to allow the Town Council to do so at their expense.

Hertzog, for plaintiffs: In order to entitle the municipality to the ground it must be expropriated so as to be *in usu publico* and *pro bono publico* and it must not be destined to come *in patrimonio fidei*. Even if this expropriation were for public use it must be shown to be necessary to the extent to which expro-

priation had taken place; and with reference to extent, if half an erf was sufficient they could not take the whole; if the right of using were sufficient they could not take the ownership. See Ordinance 21 of 1904, Proclamation 11 of 1902 and Law 1 of 1899. Sec. 8 of Ordinance 21 of 1904 gave the right to expropriate land or rights in respect thereof. Public benefit did not include adornment, *e.g.*, for parks. It did not appear that the ground was wanted for the public good but for private municipal purposes. The powers of the council were limited by Ordinance 35 of 1903 which would have met the difficulties raised by the defence, but this ordinance did not apply, as expropriation took place under the special ordinance. Defendants were bound to exhaust their other rights before resorting to expropriation. Grotius, *de jure Belli ac Pacis*, lib 2, cap. 2, sec. 6 (Whewell's translation), *ib. lib* 2, cap. 14, sec. 7; Bynkershoek, *Quaest. Jur. Pub.*, lib 2, cap. 15; Maxwell, *Interpretation of Statutes* (3rd ed. pp. 399, 419); *Herron v. The Rathmines & Rathgar Improvements Commissioners* ([1892] A.C. 498); *Handwörterbuch der Staatswissenschaften*, vol. 3, p. 621, *sub voce* *Enteignungsrecht*; Maxwell, *Interpretation of Statutes*, chapter 3, p. 112.

[FAWKES, J.: See *Sedgwick v. Suburban and Metropolitan Railway* (7 S.C. 328).]

A. Fischer, for defendants: Bynkersboek and Grotius did not lay down law but rather preached morality. See *MacDonald v. District Engineer of the Midland and North Eastern Railway* (7 S.C. 290); *Landmark v. van der Walt* (3 S.C. 300); *Gillett v. Colonial Government* (14 S.C. 185).

Cur. adv. vult.

FAWKES, J.: The plaintiffs claim that they are entitled to the free ownership of a piece of land at present forming part of erf No. 15, Douglas Street, which has been expropriated by the defendants under the powers given by Ordinance 21 of 1904, and ask for an order declaring the expropriation null and void and an interdict restraining defendants from further interfering with plaintiffs' right to the land in question, and damages.

In 1904 a great disaster in the shape of a flood occurred in Bloemfontein, causing serious loss to life and property, and as this disaster was attributed to the insufficiency of the natural spruit to carry off a heavy rain the Town Council proposed to undertake extensive works in connection with the old spruit to prevent a repetition of this catastrophe. With this object they approached the Government and the Ordinance, No. 21 of 1904, was enacted. The preamble recites that it is necessary in the interests of the city of Bloemfontein that extensive works should forthwith be undertaken in connection with the watercourse known as Bloemspruit traversing the said city. Section 1 provides for the raising of a loan for the purpose of carrying out the works necessary for and incidental to the widening, straightening and bridging of the watercourse running through the city of Bloemfontein, etc., and section 8 provides *inter alia* that the said municipality . . . are empowered, subject to the payment of compensation, to expropriate land or any rights in respect thereof for any of the purposes mentioned in the above section of the ordinance, and thereupon all rights of occupation in respect of the said land shall cease and determine. The section further applies *mutatis mutandis* the provisions of Law 1 of 1899, as amended by Proclamation 11 of 1902, in respect of land expropriated in terms of this section.

Mr. *Hertzog*, on behalf of the plaintiffs, urged (1) that the land in question was not necessary for or incidental to the purposes described in section 1; (2) that as the plaintiffs had offered to allow the defendants to occupy and use and alter the character of the ground in any manner necessary for the undertaking and to pay the cost of the alteration it was not necessary for the defendants to expropriate; as they could effect the necessary object in a manner less burdensome to the owner of the soil than by expropriation, they were bound to resort to the remedy least injurious to the plaintiffs, and he cited *Grotius* and other great authorities of the past who laid down the ethical doctrine that private persons should not be deprived of their property except when it was necessary for the public good, and also *Maxwell* on the *Interpretation of Statutes*, to show that when interpreting the wording of an enactment which appeared

doubtful the court would assume the law-giver was acting upon the above doctrine, and would construe the loss strictly in the manner least burdensome to the private owner. We entirely agree with his proposition, but if the language and intention of the statute is clear we are bound to give effect to it.

Now the ordinance provides that any property required for the purpose of carrying out the works necessary for or incidental to the widening, straightening . . . of the watercourse may be expropriated. Mr. *Hertzog*, however, argues that it becomes unnecessary if the work can be carried out by other means than by expropriation, as in the present case where the site is not permanently required and where the owner is willing either to effect or pay for the necessary alteration of its surface. We think the words "necessary or incidental to" refer to what was required to effectually carry out the large operations the undertaking entailed, and is not confined to what was merely required for the site. With reference to the other objection, that having regard to the offer of the plaintiffs no expropriation was necessary, it is obvious that no large scheme necessitating the entering upon and occupying of private property is possible without powers of expropriation being obtained, otherwise any single proprietor could defeat the scheme; the power is given on the assumption that private owners would be unwilling to meet the promoters on reasonable terms. The question is not whether the defendants should or need have exercised their powers, but whether they had power to expropriate. The expropriation is effected under the provisions of the law by the fact of publication in the *Gazette*, and thereupon by sub-section 1 of section 8 of the ordinance all rights of occupation of the said lands cease and determine, and by section 6 of Proclamation 11 of 1902, from the date of expropriation the public body on whose behalf the property was expropriated is placed in the position of registered owner. The procedure and powers given under the Ordinance seem clear, and we should have to import provisions into the law in order to hold that the defendants, before acting on their powers, must ascertain if private owners will voluntarily give them what they require.

The case therefore depends on whether the defendants had as

a fact to acquire possession of the land in dispute for the purpose of carrying out the works necessary for or incidental to the widening, straightening and bridging of the watercourse running through the city. If its acquisition was unnecessary for the purpose or merely a convenience to effect a saving, I think they would not be entitled to expropriate. We have had upon this point the expert evidence of the city engineer, upon whose opinion the scheme was adopted and who also worked out the details and prepared the plans, and at the request of the parties we have viewed the locality. The land in question originally formed part of erf No. 15, in Douglas Street, extending from Douglas Street on the south to the centre of the bed of the old spruit. The new cut of the spruit with the 50 feet road on either side divides the erf, and the whole of the erf with the exception of the portion between Douglas Street and the boundary of the new 50 feet road lying to the south of the new spruit was expropriated by the notice the defendants gazetted. The plaintiffs raise no objection to the expropriation of the portion upon which the new spruit and the two adjoining roads are constructed, but they claim that this portion embraces the entire project, and that the portion of their land lying to the north and bounded by the middle line of the bed of the old spruit cannot be necessarily required for its completion. It should be borne in mind that the defendants were undertaking, in place of the natural storm drainage, to construct an artificial water-course to carry off the storm water, not only from the catchment area above the town, but the surface water from the town which had its natural fall into the old spruit, and if through faulty design or construction their works failed in the latter respect and damage in consequence was caused to neighbouring property, a question of their liability for a misfeasance might arise. Again, if in consequence of their operations injury was directly caused to adjacent property, actions might be brought and injunctions sought; and surely if it was apparent that the waterway necessary to drain the catchment area above the town must be at such a level as to necessitate sites beyond the actual cut and embankment roads being filled in to prevent their being flooded, they would have to see this done or risk the

consequences. Further, if the actual embankment was the cause which necessitated the land being levelled up, would not this form part of the undertaking, or at all events be incidental to it?

Mr. *Hertzog* asks us to draw a distinction between the portion which actually formed the old bed of the spruit and the 26 or 27 feet lying between the old bed and the new embankment road. The evidence of the city engineer is that it would be practically impossible to drain this old bed which is 2 ft. 6 in. lower than the corresponding level of the new channel. It must be filled in or it would remain a stagnant pond, and the result of filling it in, owing to the new levels to which the ground above and below this property are raised, is that the piece of ground between the bed and the road must also be slightly raised to avoid water collecting. We have, therefore, the evidence of the city engineer, who is responsible for the work, that the expropriation is necessary for the undertaking, and he has given as the reasons for his opinion: the levelling required to avoid flooding, the insanitary conditions which might otherwise result, the necessity for the site to dump material coming from the new cutting.

In deciding what is necessary within the meaning of the section it is important to bear in mind the nature of the evidence upon which the Court will base its decision, and in this connection I will refer to some English decisions. The leading case is *Stockton and Darlington Railway Co. v. Brown* (9 H.L. 246). In this case a railway company proposed to take certain land belonging to a lunatic. The Lords Justices, acting on behalf of the lunatic, appointed Mr. Hawkshaw, an eminent railway engineer, to report on the necessity of taking the lunatic's land. He reported that it was not necessary to take the whole of the land lying on the north side of the railway, because some of the purposes to which the railway company proposed to apply that land would be equally served by the land on the south side of the railway. The Lords Justices issued an order that the land of the lunatic was only to be taken in terms of Mr. Hawkshaw's report. Against this order the Railway Company appealed to the House of Lords, who reversed the decision of the Lords

Justices. Lord CAMPBELL says in the course of his judgment: "I think a mistake has been committed in requiring the appellants to consent to the arrangements and terms specified in Mr. Hawkshaw's report. All the land claimed by the appellants is asserted to be necessary for their purposes, and competent witnesses swear that it is necessary. Mr. Hawkshaw, the expert appointed by the Lords Justices, is of a different opinion. If it had been proved that the company was acting *mala fide* and trying under the powers of the Act of Parliament to get possession of lands of Brown which were to be applied to other and different purposes, I think the court would have been justified in interfering by injunction; but of this charge against the appellants I can find no sufficient evidence, and while acting *bona fide* they must be considered as the proper judges of the portion of the land that is required for purposes that are legitimate." Lord CRANWORTH, further down, observes: "In such cases the legislature, having provided what it considers sufficient means for securing adequate compensation to the owner of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers. This principle is founded on good sense, and has been sanctioned by authority in more than one decided case."

This case was commented upon in the case *Kemp v. South Eastern Railway Co.* (41 L.J., Ch. 404), in which the LORD CHANCELLOR says: "There is one other point as to whether the land was required for the railway . . . there is sufficient evidence in the engineer's report. He says that a goods station was intended, although the traffic did not yet demand it, and the amount taken appears to be reasonable. It was quite proper for the company, while their powers were still in force, to provide land for their present and prospective wants. It would have been different if there had been any case of fraud. What Vice-Chancellor KINDERSLEY decided in the case of *Flower v. The London, Brighton and South Coast Railway* (34 L.J., Ch. 540) was, that the mere *ipse dixit* of the engineer was not sufficient, he must point out how the land was required. It is most important that the principle in the *Stockton and Darlington Railway Co. v. Brown*, making the statement of the engineer of the company

conclusive, should be maintained, so as to save the court from a flood of affidavits with which it would otherwise be deluged. Reference is also made to the two previous cases in the case of *Errington v. Metropolitan Railway Co.* (19 L.R., Ch. D 559). JESSELL, M.R., says: "The last objection was this, it is said they do not want the mines. As to that, the observations of Lord CRANWORTH in the *Stockton and Darlington Railway Company's* case are of great value, and they fairly state the meaning of these Acts of Parliament. It is the company who are to be the judges of what they require unless they are not acting *bonâ fide*; and the only evidence required is the opinion of the surveyor or engineer or other officer of the company, unless the other side can show that they are not acting *bonâ fide*. Now of course you may show want of *bona fides* in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd under the circumstances that it cannot possibly be *bonâ fide*. As regards the first ground, there was an attempt made here, but it was unsupported by evidence. It was the belief of a gentleman without any facts and was not admissible in evidence at the trial of the cause; that therefore must be put out of the case. The second ground is this: it is said you cannot want the minerals at all because you can be sufficiently protected by the 78th section. But the answer to that is very simple. The company are the judges whether they would rather have the mines now or wait until someone else begins to work them."

In the same case, BRETT, L.J., says: "I think the cases of the *Stockton and Darlington Railway Co.* and *Kemp v. South Eastern Railway Co.* intend to lay down precisely the same doctrine, for the LORD CHANCELLOR in the latter case says it would be wrong to derogate in any way from the former case. The cases really mean this, that the opinion of the railway authorities is to be the governing matter as to whether the things are for the advantage of the railway, if that opinion is an opinion *bonâ fide* expressed and *bonâ fide* laid before the court. That seems to me to be the meaning of it."

I would also refer to the following passage in the judgment

of STIRLING, J., in the case of *Lewis v. Weston-Super-Mare Local Board* (58 L.J., Ch. 45): "Here the legislature is dealing with a public body charged with the performance of certain public duties. In the performance of those duties the interests of the public ought primarily to be regarded, and in such a case 'necessary' may well mean necessary for the efficient discharge of those duties in the way which is most for the benefit of the public. In the natural course of things the sewer and water mains would generally be laid under streets and the legislature evidently contemplated that this would be the course adopted; but if the public interest requires it, if the sewerage can be more efficiently removed or the water better conveyed by laying the sewers or mains in the lands of private persons, it seems reasonable that the board should be able to adopt such a course, and I think the power to do this was intended to be conferred. I think, therefore, that it is the duty of the surveyor to take all the circumstances of the case into consideration and to come to a conclusion as to the best course to be pursued and to report accordingly, saying what is necessary to be done in order to carry into effect the scheme which commends itself to his judgment. If the court finds that the surveyor has exercised his judgment and come to a conclusion in good faith, I apprehend that it ought not to interfere, although other courses by which the necessity for entering upon private lands might be avoided might be pointed out and may be admitted to be practicable, and even although engineers of greater eminence than the surveyor may come forward and say that they would themselves have reported in favour of the adoption of one of the alternative courses."

With the exception of the last authority these cases apply to acts which give extraordinary powers to railway companies and other undertakings for gain; and adopting the principle laid down in these cases and in the judgment of STIRLING, J., we think that the evidence of the city engineer (supported as he is by the contractor's engineer) should be sufficient for defendants' case, unless the plaintiffs can show that it was not given as a *bond fide* opinion; this they have not done. In these cases the powers given by parliament to railway companies have received a strict interpretation. If we thought the facts in this case would not

be covered by these decisions and it were necessary to seek a more liberal interpretation of the powers given by legislation of this sort, there are authorities which draw a distinction between undertakings for purposes of gain and public bodies effecting public improvements; see *Galloway v. The Corporation of London and the Metropolitan Railway Co.* (L.R. 1 English and Irish App. 34), followed in *Quinton v. The Corporation of Bristol* (43 L.J., Ch. 783). So far for English authorities. The same principle seems to have been adopted in *MacDonald v. The District Engineer of the North Eastern Railway* (7 S.C. 290), where the CHIEF JUSTICE in the course of his judgment says: "But if it is said the Government does not require this additional land for railway purposes it is quite possible an action may lie, but until it is proved, we have no right to assume the Government is merely pretending to exercise its rights under the Act which only authorises it to take private land for railway purposes when in fact it does not so require the land. It will be time enough for the appellant to complain when it is proved the Government is acting wrongfully." Again in *Landmark v. van der Walt* (3 S.C. 300), the CHIEF JUSTICE of the Cape Colony, in the course of his judgment, says: "If the plaintiff could have proved that the property was not *bond fide* required for railway purposes, and that the railway department had expropriated this land for a sinister and ulterior purpose, there would be much force in Mr. Maasdorp's contention." See also the case of *Grimbeck v. Colonial Government* (10 Searle, 268).

There will therefore be judgment for the defendants, with costs.

WARD, J., concurred.

Attorneys for plaintiffs: *Botha & Titley*; Attorney for defendants: *J. G. Fraser*.

POTGIETER v. GROENEWALD.

1905. August 18. FAWKES and WARD, J.J.

Donation.—Registration.

A donation *inter vivos* exceeding £500 in value which is accepted by the donee is valid as between the parties although not registered.

The plaintiff in this case was married in community of property to Alida Maria Potgieter (born Swart), and defendant had been married to a sister of plaintiff's wife. Defendant's wife died in July, 1901, intestate and without having had any issue. According to the liquidation and distribution account filed in the estate of defendant's late wife her brothers and sisters, amongst whom was the plaintiff's wife, were each entitled to £606, 12s. 2½d. as their *ab intestato* shares. Plaintiff now brought an action to recover the said amount from the defendant in his capacity as executor in the estate of his late wife.

The defendant, who defended both in his official and private capacity, admitted that plaintiff was one of the *ab intestato* heirs, but pleaded that he and his late wife had made a mutual will on the 9th July, 1883, whereunder, there being no children of their marriage, the defendant as survivor of them would have been the sole heir of his wife on her predeceasing him; but the said will not having been signed and witnessed on one side of every leaf thereof became and was treated as void. That the plaintiff and his wife, well knowing all the facts, on the 15th October, 1902, duly renounced all their right to succeed *ab intestato* to any inheritance out of the estate of defendant's late wife. In consideration of plaintiff and his wife so renouncing their rights defendant promised and did give to them the sum of £100, partly in cash and partly in value. Defendant also instituted a claim in reconvention for a discharge or receipt in terms of the deed of renunciation, which was in the following terms:

We, Alida Maria Swart and Jurie J. Potgieter, married in community of property, hereby declare to be acquainted with the contents

of the will of our late sister, Johanna Margaretha Susanna Swart, and her spouse, Jacobus Hermanus Groenewald, of the farm Jagersrust, district Heilbron. And being well aware that it was the desire of our aforesaid sister that her spouse aforesaid should remain in full possession of the joint estate as heir. And also knowing that no effect can be given to her desire, because the aforesaid will cannot be acted upon, as the signature of the same is incomplete in certain respect, we out of love and respect for our deceased sister aforesaid, and her spouse aforesaid, hereby declare to renounce any benefit or inheritance that might accrue to us from the estate as heirs *ab intestato* of our said sister, the late Johanna Margaretha Susanna Swart, and we hereby promise and bind ourselves to give and sign receipts for any inheritance which may be awarded to us in the liquidation and distribution account to be framed, so that the executor of the estate shall not be bound to pay the same to us, but the same shall remain in possession of the said Jacobus Hermanus Groenewald as his property.

Thus done at Anniesvreugde on the 15th October, 1902.

ALIDA MARIA POTGIETER.

J. J. POTGIETER.

As witness:

J. L. MURPHY.

To this defence the plaintiff replied that on or about the 15th October, 1902, the defendant had paid plaintiff and his wife a visit on the farm Anniesvreugde and then and there told and represented to them that his late wife, Johanna Margaretha Susanna Groenewald (born Swart), had left a last will and testament whereby defendant was sole heir, and that in consequence of the said will the heirs *ab intestato*, amongst them plaintiff's said wife, were excluded from any share in the inheritance of his late wife. After making this representation concerning the will, the defendant handed the same or copy thereof to plaintiff to read in order that he might satisfy himself as to the truth of defendant's representations as above stated, which plaintiff did; but neither plaintiff nor his wife noticed that any legal formalities were wanting, and defendant never in any way informed them of the fact that the will was defective in any formality or that no effect could be given to the same, but on the contrary, by his misrepresentations and otherwise made them believe that it was a good and valid testament. After plaintiff had read the will defendant produced the deed of renunciation, but did not tell them the real nature of the document, saying

that the same contained nothing particular and that the only object which it was intended to serve was to facilitate the liquidation of the estate and to enable him to re-marry. Plaintiff and his wife relying on defendant's statements signed the document without being acquainted with the contents thereof. Subsequently it had been discovered that the will had been rejected by the Master, and the plaintiff became aware that the document he and his wife had signed was not in fact what had been represented to them. Plaintiff further alleged that the £100 was given as a present to his wife and without any reference to the signing of the deed of renunciation, and even if the facts as stated by defendant were true the deed of renunciation was in the nature of a donation *inter vivos*, and being for the sum of £606, 12s. 2½d. was null and void for want of registration.

The Court found as a fact that there had been no misrepresentation on the defendant's part, and that the deed of renunciation created a donation, consequently the question of the necessity of registration arose.

Hertzog, for plaintiff, referred to Voet 39, 5, 15; 39, 5, 17; Sande, *Opera Omnia (definitiones)* lib. 5, 1, 3. Moneys due in private capacity cannot be set off against money due in fiduciary capacity, *Ziervogel v. van Zijl* (5 E.D.C. 121); Kersteman, *Woordenboek, sub. voce Compensatie*; quoted *Thorpe's Executor v. Thorpe's Tutor* (4 S.C. 488).

A. Fischer (with him *de Jager*), for defendant.

Cur. adv. vult.

FAWKES, J.: The plaintiff, who is married in community to defendant's deceased wife's sister, claims through his wife £600 in the liquidation and distribution account in the intestate estate of defendant and his late wife. Against this the defendant sets up a document which was signed by the plaintiff and his wife, which renounces any interest they may have had in the estate, and to this the plaintiff replies that the document was obtained by fraud or misrepresentation, and that the signatories were

ignorant of its contents. There are other points of law raised by counsel for plaintiff upon the construction of the document with which I will deal later.

After listening to the evidence which has been given at great length, there is little doubt in my mind that one or other of the parties has committed perjury. Putting aside the small discrepancies which we must expect from persons describing events which occurred as long back as two years, there is a direct conflict of evidence on important facts which must have been clearly impressed on the minds of the parties. It is common cause that the defendant lived some thirty years happily married in community with his deceased wife, that practically the whole of their fortune was amassed during their married life, that they made the joint will which has been produced, that the defendant's wife died during his captivity in India, and that on his return the will, which had been buried, was dug up and shown to his attorney, Mr. Luijt, who advised that it was invalid by reason of its being insufficiently signed. The Master has on this ground refused to admit it as a will.

The case has been argued on both sides on the assumption that the will was invalid, and we are not asked to decide that question. To meet the consequences of the defect in the will Mr. Luijt prepared documents for the signature of the defendant's sisters-in-law and advised the defendant to take these documents and explain their contents and the defect in the will to the sisters and obtain their signatures. With this object the defendant visited Mr. and Mrs. Potgieter at their farm. The defendant therefore set out with the knowledge and on the advice of his attorney to obtain what was a very reasonable request, and it is difficult to understand, unless the defendant had reason to suspect his relatives, why he should fear the sisters would take advantage of a mistake in the will to deprive the husband of their late sister of property which was no family inheritance, but had been made by the defendant's own exertions. In considering which of the two stories is the more probable it is important to bear in mind that the defendant would (as Mr. Luijt undoubtedly did) adopt this view. On his arrival at Mr. Potgieter's farm house he states that before supper in the dining-room he explained the position

to Mr. and Mrs. Potgieter, that he gave them the will and the document to read and he promised Mrs. Potgieter £100 if she would sign, that Mrs. Potgieter consented, but put off the signing till after supper, that after supper they went to the room behind the curtain, where the will was again read aloud by the plaintiff and the £100 again promised, that they then returned to the front room, where Mr. and Mrs. Potgieter signed the document and Murphy signed as a witness.

The plaintiff and his wife on the other hand deny that the object of defendant's visit was referred to, or the will and document produced before supper. They declare that the defendant before supper merely offered the £100 as a present without reference to the will (Mr. *Hertzog* urges this was done to prepare the way for the misrepresentation which the plaintiff says followed), and that after supper in the bedroom the defendant gave the will to plaintiff to read to Mrs. Potgieter, leading them to suppose it was valid; that he again added his promise of the gift of £100 to plaintiff to persuade her to sign the document, which he represented as required for his second marriage in order to save trouble and expense, there being a new Government; that he then in the dining-room produced the document carefully folded over, so that the contents could not be seen, and got them to sign their names at the foot, having misled them as to its purport and object.

This would clearly disclose a carefully prepared fraud. Mr. *Hertzog* calls it misrepresentation, not necessarily fraud. If we are to believe the witnesses for the plaintiff it was a very serious fraud, and when fraud is set up it must be clearly proved. The plaintiff called two persons, Roos and Murphy, who were at the farm house on the night in question, to corroborate their story, but I am not satisfied that either of these witnesses was in a position to corroborate the evidence of plaintiff and his wife, that the object of defendant's visit was not explained to them before the supper, and I do not think their evidence is very satisfactory as to what took place after supper. Every act and word done and uttered by the persons in the house that evening has been minutely examined and cross-examined, and counsel have succeeded in bringing out many contradictions. As, however, the

witnesses are recalling their recollection of incidents which occurred two years previous, too much stress must not be laid on many of these contradictions. I think it safer in a case of this sort to rely rather on the broad features of the case.

Some stress was laid by counsel on the fact that defendant produced similar documents upon which the plaintiff was asked to indorse the names of the other sisters, the contents of which he says were not shown him. If the defendant was in fact committing this fraud it seems strange that he should for no serious reason run the extra risk of his fraud being discovered by the unnecessary production of additional papers. Now, persons who sign a document are presumed to know its contents, and in the present case where the person signing is an educated man who has been in the habit of assisting the person who proffered the document by reading to him letters and papers which he found difficult to read and understand himself, the presumption appears to me very strong that he would acquaint himself with the contents before signing or allowing his wife to sign, and I should have thought that his suspicions would have been aroused had he noticed, as he says he did, the paper held down folded so as to carefully conceal its contents at the moment he and his wife were asked to sign. Again, the reason which he says was assigned for requiring the signatures to the document I can hardly believe would convince a man of his evident intelligence. It seems strange again that he and his wife should show so little interest in their brother that they should not trouble to inquire who the lady was when he told them he was going to re-marry.

Comparing the two accounts, the story of the Potgieters appears to me to be full of improbability, while that of the defendant only carries out what he had been instructed to do by his attorney, with the mere addition of the promise of the £100. How far are these stories corroborated by the subsequent conduct of the parties? The defendant, after obtaining the signatures, returned the documents to Mr. Luijt and is not shown by the evidence to have subsequently done anything inconsistent with the part he asks us to believe he played in obtaining these signatures. While, if we believe the Potgieters, they actually

accepted the £100 or its worth given them in perpetration of this fraud from the man whom they then believed had tricked them into signing away their inheritance. Again, being aware of the fraud, is it likely they would have delayed for two years raising any complaint and continuing all the time on friendly relations with the man who had injured them and abstained from saying a word to him on the subject? Mrs. Potgieter tells us that she had her suspicions aroused by the defendant asking her for the names of the relatives, and that she asked Mr. Luijt what was the nature of the document she had signed, and on his telling her she became aware of the fraud. Mr. Luijt cannot recollect anything of the kind occurring. He says had it occurred he would certainly have asked his client, the defendant, for an explanation, and the matter would not have passed from his mind. Having regard to the instructions he had given the defendant and the serious imputation Mrs. Potgieter's inquiry must suggest, I think it extremely unlikely Mr. Luijt would have forgotten the circumstance, had it occurred. After a careful consideration of the whole of the facts I come to the conclusion that there was no misrepresentation or fraud on the part of the defendant, and that the document was signed by the plaintiff and his wife with full knowledge of its contents.

The document in question was not registered, and Mr. *Hertzog* argues that as it amounts to a donation of property exceeding £500 in value it is only valid to the extent of £500 and that he is entitled to judgment for the excess beyond that amount. Mr. *Fischer*, on the other hand, contends that the transaction was in fact a purchase and sale and that the £100 was given and accepted in consideration of the plaintiff transferring his interest in the inheritance to the defendant. The document reads as follows . . . " We out of love and respect for our deceased sister aforesaid, and her spouse aforesaid, hereby declare to renounce any benefit or inheritance that might accrue to us from the estate as heirs *ab intestato* of our said sister the late Johanna Margaretha Susanna Swart, and we hereby promise and bind ourselves to give and sign receipts for any inheritance which may be awarded to us in the liquidation and distribution account to be framed, so that the executor of the estate shall not be bound to pay the

same to us but the same shall remain in possession of the said Jacobus Hermanus Groenewald as his property. . . ."

The defendant's evidence as to the £100 is, "Mr. Potgieter then made a light. After that he read the document to Mrs. Potgieter and when it came to the part where she renounced the inheritance she seemed to hesitate about signing. Plaintiff said, you had better sign it, and I said, well, if you sign I will give you £100; plaintiff said you had better sign it as he has worked hard for it, and you had better renounce your rights." The promise of £100 was not, I think, made or understood as a consideration for the act of the plaintiff and his wife; it was rather a promise of a gift which the defendant believed would tend to make his sister-in-law more disposed to do the generous act. It was not the mere relinquishment of a right which would not require registration; by the last paragraph the property belonging to the plaintiff by inheritance is transferred to the defendant: he was in possession of it and he is to remain in possession.

In this view the transaction must in accordance with South African decisions be treated as a donation and would require registration to be valid beyond £500 as against third parties and creditors, but the question arises whether the donor can take advantage of the absence of registration in an action he has brought against the donee. It is not, I think, for the protection of the donor that registration is now required; the method by which registration is at the present time effected would for his protection be wholly ineffectual. At one period it was no doubt for the protection of the donor as well as for that of his heir and third parties, and the necessity of the appearance before a magistrate who could interfere to prevent the donor being defrauded was then required. In modern times the Registrar of Deeds would register a donation as a matter of course, and the sole object can only, I think, be to ensure that third parties shall have due notice of a donation. As the CHIEF JUSTICE of the Cape Colony in the case of *Slabber's Trustee v. Neezer's Executor* (12 S.C. 163) says, it is to prevent frauds on a large scale that registration of all donations exceeding £500 in value was required. The only authority in South Africa that I can find upon this point is the case of *Barrett v. The Executor, of O'Neil*

(Kotzé, 109), where Mr. Justice KOTZÉ in his judgment says: "I must accordingly hold that where the donation exceeds the value of 500 *aurei* the want of registration invalidates so much of the donation as is in excess of this amount. When once a donation has been accepted the donee has a right of action against the donor to compel him to make tradition or to give transfer of the subject-matter of the donation even though there has been no registration as in the present case." Further down he says: "Although registration may be necessary to the validity of a donation above 500 *aurei*, and consequently an unregistered donation above this amount would not hold good as against the creditors of the donor, still as between donor and donee once a donation has been definitely accepted the former can be compelled to make tradition of the gift to the donee. Burge, in his *Colonial Law* (vol 2, p. 810), in speaking of the French law as to donations which had been embodied in ordinances, says the omission to register the donation cannot be set up by the donor. It is not for his security but that of his creditors and heirs that registration is enjoined, and he cites Pothier as his authority.

In the present case everything had been done to complete the donation, the subject of it was in the possession of the donee and he had clearly accepted it. The donor cannot, I think, take advantage of the want of registration, and the judgment therefore must be for the defendant, with costs.

WARD, J.: The facts are so fully stated in the judgment of my learned brother that it is unnecessary for me to go through them again. The will which has led to this action has been rejected by the Master because it did not contain the signatures of the testators and witnesses on each leaf. The will is an ordinary common form and, with the exception of the names and descriptions of the parties, printed. It struck me as peculiar that on a printed form such as this, which seems to have been drawn up by a professional man, there was nothing to indicate that it should be signed on the first leaf. The omission is, however, explained by reference to the law reports. Since 1856 the law, following the Cape Statute, required that a will should be signed on one side of each "*blad*," but it is clear from the case of *Ex*

parte Smit (1 Gregorowski, 4) that a will signed in the way in which this will is was regarded, at least by the Orphan Master, as perfectly valid. Whether it was so regarded by the profession I am unable to say. So little common sense is there in this requirement that an eminent judge of the Cape Colony, who was reckless enough to suppose he could draw up his own will, came to utter grief. In the case of *Smit* above referred to, the Master reported to the Court that it had been the practice of his office to accept wills signed as the present one. The High Court, however, following the Cape case of *Walker v. Walker's Executors* (1874, Buch. p. 144) declared that the will was invalid. This was on 1st December, 1883. The will of the defendant in the present case was signed previously on the 19th July of the same year. The case is a hard one, as the defendant's will was evidently considered, by the Master's office at least, as perfectly valid when it was executed; but however hard, we must decide it strictly according to law.

As regards the facts of the case I will briefly point out the difficulties I have in accepting the evidence of the plaintiff and his witnesses: firstly, it appears to me exceedingly improbable that nothing was said as to the object of the defendant's visit to Anniesvreugde on the 15th October, 1902, until after supper; secondly, it further appears very improbable the signature to the document of renunciation was obtained by the defendant in the manner stated, namely, by holding the document folded down with his hand and informing the plaintiffs that the new Government required that before he could marry again he had to get the consent of all his deceased wife's relations. This would indeed be adding a new terror to matrimony. The improbability of this story is very much increased by the admitted fact that almost immediately after getting the plaintiff and his wife to sign this document, the defendant should run the risk of discovery by placing in the hands of the plaintiff a number of similar documents, which would at a glance inform him of the real character of the one he had signed; thirdly, the plaintiff and his wife admit that after the discovery of the defendant's fraud upon them they still accepted the £100 which the defendant had promised. This, under the circumstances, is such unlikely con-

duct that even if it stood alone I would have great difficulty in believing the plaintiff's story. On the other hand the version of what happened, as given by the defendant, has no inconsistencies and improbabilities about it.

On the facts, therefore, the plaintiff has failed to satisfy me that the document was improperly obtained. But this decides only half the case. Mr. *Hertzog* has a second ground of attack namely, that the transaction between the parties was a donation, and being for an amount over £500 is void for want of registration. He admits, however, that the invalidity affects only the excess over £500. Mr. *Fischer* on the other hand claims that consideration was given for the surrender of plaintiff's rights, and that what took place between the parties was, as I understand him, of the nature of a *transactio* or compromise. But, as I read the evidence, there was never any idea of compromising rights. The only question was, Would the plaintiff and his wife carry out what was believed to be the wishes of the latter's deceased sister by surrendering the *ab intestato* rights? Mr. *Fischer* further contends that the £100 which has been paid by the defendant to the plaintiff should be set off against the £600 odd sued for. It seems to me, however, that the sum of £100 was given by the defendant to overcome Mrs. Potgieter's reluctance to sign the document, and if that document has become useless because of the defendant's failure to have it registered, I fail to see how he can recover from, or set off the amount against, the plaintiff. Mr. *Fischer* takes another point, namely, that as the inheritance would in the ordinary course be only payable sometime after the document was signed, we must, assuming it to be a donation, calculate its present worth at the date of the renunciation. Without going into the matter generally, I think that it is a sufficient answer to this contention that the defendant has always had the enjoyment of the inheritance relinquished by the plaintiff. He cannot therefore ask for discount as if he only received it at the date of the liquidation account.

Assuming then the transaction between the parties to be a donation, I do not think it can be reduced below £500, and the question is, What consequences flow from non-registration as between donor and donee? Registration of donations was intro-

duced by a constitution of Constantius Chlorus, which was confirmed by his son Constantine the Great. This constitution required that all deeds of gift should be in writing and registered. Theodosius and Valentinian dispensed with writing and also with registration when the amount of the donation did not exceed 200 *aurei*. This amount was increased by Justinian to 500 *aurei*, and certain donations were exempt from registration altogether (see the *Code*, bk. 8, tit. 54). The solemnity of registration had doubtless a twofold object, namely, to prevent donors parting with their property inadvisedly, and also to prevent fraud on third parties by pretended gifts, especially amongst relatives, and I think it is clear that unregistered donations, in so far as they exceeded the 500 *aurei*, were a nullity, even as against the donor. But the development of the law has been in the direction of allowing greater liberty to the individual in dealing with his property and compelling him to fulfil his promises deliberately and seriously made. Sir HENRY DE VILLIERS observes in *Slabber's Trustee v. Neezer's Executors* (12 S.C. 163) that "there are few rules of the early Roman law which can be accepted without some qualification. What appears to be a difference of opinion between writers of authority is often caused by the fact that they wrote at different periods during which the law has undergone considerable change. There is no branch of the law which has been more altered than that which relates to donations."

When we come to comparatively modern times we find the two great Roman-Dutch institutional writers, Grotius and van der Linden boldly asserting that no registration is required at all, even when the donation exceeds 500 *aurei*. Were it open to me I would perhaps be disposed to err in the company of such illustrious jurists, but the principle that 500 *aurei* or £500 require to be registered has been too frequently and consistently affirmed in South African courts to be any longer an open question. van Leeuwen, Voet, Schorer, van der Keessel, and a host of other writers who hold that registration is still required, seem to lay down that it is maintained for the benefit of creditors and other third parties. The protection of the donor has dropped out of sight. The machinery, too, by which registration (the institution of Roman law) was effected has changed. Formerly the

parties had to appear before the local judge, whose duty it was to see that no advantage was taken of the donor and that rights of third parties were properly protected; whilst with us registration is simply effected, without inquiry, by an entry in the books kept by the Registrar of Deeds. This may be a protection to persons who have business relations with the donor by giving them timely notice of how he is dealing with his property, but it can serve no useful purpose as regards the donor himself, who must be taken to be aware of his own acts. Registration at the present day, in my opinion, affects and is only adapted to affect the validity of a donation as regards third parties, and consequently the donor cannot attack the validity of his own act of donation on the ground that the law as to registration has not been complied with. And this seems to have been the conclusion arrived at by the High Court of the Transvaal in the case of *Barrett v. O'Neill* (Kotzé, 104), where it is explicitly laid down that the representatives of a donor cannot avoid completing a donation merely because it exceeds £500 and has not been registered. Moreover, I have examined all the South African cases relating to donations, and I have not succeeded in finding one in which that position is taken up. I am of opinion, therefore, that the contention of the plaintiff is in this respect untenable.

So far I have treated this transaction as being a donation, and that is the most favourable point of view for the plaintiff. I think, however, that it is open to doubt whether it should be so regarded. The document which was signed by the plaintiff is as follows [given above in Mr. Justice FAWKES' judgment]. From this document it is clear that the impelling motive which influenced the plaintiff's conduct was the desire to carry out the wishes of the deceased wife of the defendant as expressed in the invalid will. The benefit which accrues to the defendant in carrying this wish into effect is only incidental to the main purpose and does not legally amount to a donation. Savigny, in the third chapter of his work on Roman law, makes an exhaustive analysis of the legal conceptions which are included in the term "donation." In sec. 152 he lays down that there must be present to the donor the intention of enriching the

donee. He gives many illustrations of this and goes on to say: "Lastly, there are cases where the determining motive of the act is a sentiment of reverence towards the person benefited or towards a third party. The benefit conferred is in that case only a secondary consequence and cannot be reckoned as a donation. Where a testamentary heir pays the whole of a legacy without deducting the Falcidian fourth, the result of this course of action is to benefit the legatee, but if the heir in acting thus does so only through respect for the testator, this act is not of the same force as a donation, and on that account it is allowed between spouses;" and lower down he says, "registration is not necessary." If this be an accurate statement of the law, and I know of nothing opposed to it either in the works of Roman-Dutch writers or in South African decided cases, then it is clear that on this ground also the plaintiff's claim, in so far as it is founded on donation, must fail.

Plaintiff's Attorney: *J. W. G. Steyn*; Defendant's Attorneys:
Botha & Titley.

TRUTER v. DUNN.

1905. November 16. MAASDORP, C.J., and FAWKES
and WARD, J.J.

*Purchase and sale.—Warranty.—Actio redhibitoria.—Acceptance.—
Actio quanti minoris.*

T advertised two motor cars for sale, guaranteeing them in good condition. On the 24th December, 1904, D, relying on the guarantee, bought one of the cars for £125. The same afternoon T took D out in the car to explain its working. The car did not work satisfactorily but T explained that this was due to the petrol being very old. On the 29th December D complained further about the car to T, who then said the fault lay in the carburettor, which he attended to. On this occasion D paid T £45 and gave him a post-dated cheque for £80, the balance of the purchase price. The car gave more trouble, and in the beginning of January, 1905, when D went to Dewetsdorp in the car he experienced a great deal of difficulty with it. On his return he examined the car thoroughly and discovered a serious defect in the gear-box. He then took the car to a repair shop and had a new gear wheel put in. When the post-dated cheque fell due T on presenting same found that payment had been stopped. He now sued D on the cheque. D pleaded that the car did not answer to the guarantee owing to a number of serious defects which rendered the car of no value to him; he therefore claimed that the sale should be rescinded and the part purchase price already paid by him refunded. The Court found that at the time of the sale there were at least two defects in the gear box, for either of which D would have been entitled to repudiate the contract. *Held*, that upon discovering the one defect D was put upon examination, and before effecting any repairs should have thoroughly inspected the car. That, by having the new gear wheel put in, D had accepted the car subject to all defects and could therefore not succeed in the *actio redhibitoria*.

Held, further, that the *actio quanti minoris* was nevertheless still open to D, who could therefore claim that the purchase-price be diminished, in so far as the car was at the time of the sale, owing to latent defects, of less value than it was represented to be.

The plaintiff sued the defendant provisionally on a certain post-dated cheque, being the part purchase price of certain motor car. The matter was heard on the 22nd June, 1905, provisional sentence refused and parties were ordered to go into the principal case.

The plaintiff, during the latter end of 1904, advertised the sale of certain motor cars; the advertisement read as follows:—

Duly instructed by the owner, Messrs. S. Shandel & Co., will offer for sale one 5 h.p. phaeton and one of 9 h.p. Tonnue de Dion engine, spare tyres, tubes, accumulators, &c. These two motor cars are guaranteed by the owner and purchasers can arrange terms.

The defendant attended the sale on the 24th December, 1904, and bought the one car for £125, relying on the guarantee contained in the advertisement above set forth. On the same afternoon plaintiff and defendant went out in the car to enable plaintiff to explain the working of the levers. On reaching a certain incline defendant remarked that the car was not developing 9 horse-power. Plaintiff replied that that was due to the fact that the petrol was very old. The same afternoon defendant went out to a farm fourteen miles out of Bloemfontein. On this trip the car gave some trouble, and at one time it would crawl along and then suddenly pick up; on this occasion defendant noticed that the water in the radiators started boiling. New oil had been put in but apparently made no difference to the running of the car.

On the 29th December defendant stated that he complained to plaintiff about the car; the latter then said that the carburettor had not been fixed properly and then and there attended to the car. On this occasion defendant paid plaintiff £45 and gave him a post-dated cheque for £80, being the balance of the purchase price. The day following defendant again had trouble with the car and also subsequently, when plaintiff was present, and again attributed the bad running of the car to the carburettor. In the beginning of January, 1905, defendant went to Dewetsdorp in the car but experienced a lot of difficulty both on the outward and homeward journey. On his return from Dewetsdorp defendant examined the car, putting it over a pit; he then discovered that the bearing bush in the gear box was worn about five

thirty-seconds of an inch. Subsequent to this defendant took the car to Hale's shop to have a new gear wheel put in. On plaintiff presenting the cheque for payment on the due date it was found that payment had been stopped, and defendant refused to pay the amount. Plaintiff now brought an action to recover the amount of the cheque, namely £80.

During the trial it was admitted on behalf of plaintiff that the car in its present state would not answer to the guarantee. Plaintiff maintained that it was due to the careless handling of the car that it had come into the bad state in which it was at the trial, as some days prior to the sale he had cleaned the car, and according to his evidence, found the car in good working order.

Hertzog (with him *de Jager*), for the plaintiff: A general warranty did not extend to guard against defects that are plain and obvious to the senses of the purchaser, and which require no skill to detect. According to Roman-Dutch law the object sold should be reasonably fit for the purpose for which it is sold and in reasonably good condition; any defects that could have been discovered without a minute examination must be taken with the article sold. See *Chitty on Contracts* (10th ed., p. 417); *Stroud's Judicial Dictionary* (2nd ed., *sub voce Defect*, vol. 1, p. 491); *Geard & Son v. Butler and Reddle* (5 E.D.C. 109); *Erasmus v. Russell's Executor* ([1904] T.S. 365); *Pothier* (vol. 3, sec. 213, *Sale*); *Voet* (21, 1, 7); *van Leeuwen* (*Kotzè's Translation*, vol. 2, p. 145). Defendant had the machine from the 24th to the 29th December, and if he paid the purchase price after discovering the defect he was estopped from the *actio redhibitoria*, *Voet* (21, 1, 10); *Whittaker v. McLeod* (17 S.A.L.J. 79). The defendant had exercised an act of ownership in having the small pinion wheel replaced and was on that ground also estopped.

A. Fischer, for defendant, quoted *Christie v. Etheridge* (19 S.C. 367); *Wiid v. Murison* (13 S.C. 441); *Theron v. Africa* (10 S.C. 246); *van Leeuwen, Rom. Holl. Recht* (vol. 2, p. 145, *Dekker's note*).

Cur. adv. vult.

MAASDORP, C.J.: The plaintiff in this case sues the defendant for the sum of £80, being the amount of a promissory note made by defendant in favour of plaintiff in part payment of the purchase price of a motor car sold by plaintiff to defendant. The defence is that the car was sold under a guarantee and that the car does not answer to the guarantee owing to a number of defects, one of which is that the bearing bush of the gear box was worn away and the wheels thrown out of mesh, and that by reason of these defects the car was of no value to the defendant. Defendant claimed to repudiate the sale altogether and to have the promissory note and the part purchase price already paid by him returned. To this defence the plaintiff replied that the car was in good working order when delivered and answered to the guarantee, and that if it now labours under defects, such defects are due to defendant's neglect and bad handling of the car, since he has had it. It is further alleged that defendant used the car from 24th December, 1904, to 9th February, 1905, and reduced the value of the car by his rough handling of it, that the defendant had constant use of the car from the 24th to the 29th December, and made a settlement without any complaint, and that defendant by his long use of the car has irreparably prejudiced the plaintiff and is now estopped from setting up this defence.

At an early stage of the case the Court made an inspection of the car and finding that the gear box of the car was in a desperately bad condition at present, suggested that the case might in the first instance be limited to the condition of the gear box, its bushes and gear wheels. This was accordingly done, and the Court has to decide from the evidence before it what was the state of the gear box at the date of the sale; Was it or was it not in such a condition as to answer to the guarantee? In coming to a decision on this point the Court has been greatly assisted by the expert evidence of Mr. Shaw. If it were not for this we should have had much greater difficulty in coming to a decision, for, as I stated during the course of the case, the Court was very favourably impressed with the way in which both the plaintiff and defendant gave their evidence. They seemed both to give their evidence in a fair, straightforward way, and in order to find

out on which side the truth lies we can only have recourse to the general rules as to the probabilities arising out of the surrounding circumstances, and with regard to these probabilities the evidence of Mr. Shaw is of the greatest assistance.

Before entering into this inquiry, however, it will be well to consider the charge made by the plaintiff against the defendant, that the present admittedly defective state of the gear box is due to his negligent and faulty handling of the car since he has had it. This charge, when sifted down, is reduced to the fact that on one occasion the defendant failed to declutch the engine when passing through a gutter in front of his house, that he was in the habit of changing gear in a faulty manner, and that he failed to put a proper amount of grease into the gear box. As to the charge of failure to declutch, nothing further need be said, as it is based on only one instance, and that a very doubtful one. Faulty change of gear, it is clear from the evidence generally, might have led to stripping of the cogs from the gear wheels, but not to the wearing away of those wheels, and it is wearing not stripping that is here complained of. With respect to the failure to supply grease to the gear box, we have the evidence of the plaintiff himself that he half filled the gear box with grease before the sale, and if the gear box and bushes were in the state in which he swears they were on that day, this grease ought to have sufficed to keep the car going till its return from Dewetsdorp, but in addition to this we have it that the grease was replenished on the morning that defendant started for Dewetsdorp. We are therefore of opinion that plaintiff has failed to make out his charges of neglect against defendant.

Returning to the question as to what was the original state of the car when delivered, the evidence of Mr. Shaw is as follows : " My opinion is that the middle pinion wheel is a new wheel. It is not of the same type as the original set. We know that the middle spur wheel is a new wheel necessitated by the stripping of the original middle spur wheel, and my opinion is that the middle pinion was stripped at the same time. The middle pinion, in addition, is a blue wheel and the others are polished. . . . I see evidence on the teeth of the middle pinion that it has only engaged with the spur wheel at its tips, from which I conclude that if this wheel

was put in twelve months ago the bush supporting the shaft of the spur wheel engaging with it must have been already worn when this wheel was put in. The corresponding spur wheel also bears out this supposition, because we find apparent on the teeth of this spur wheel two or three stages of wear. From this I conclude that the original pinion was responsible for one or more stages of the wear, and the present pinion is responsible for the wear on the tips of the spur wheel. . . . A bush like those in this machine ought to last for 2000 miles. They are things which ought to be continually attended to." Bringing this evidence to bear upon the rest of the evidence that we have before us, we find that immediately after the sale, during the drive of plaintiff and defendant round Naval Hill, the engine failed to develop power to such a degree that it was noticed by the defendant, who remarked upon it, and then plaintiff found it necessary to make some excuse for it. Now it is clear that the symptoms observed by the defendant were entirely consistent with what Mr. Shaw says must have been the condition of the bush and cog wheels at that time, namely, that the bush was already worn to pretty nearly its present condition, and that the wheels were not working in mesh, and that the medium pinion wheel was engaging the corresponding spur wheel merely with its tips. From what took place on the trip to Weltevreden also we may conclude that the set pin of the bush in question had already dropped out, for according to defendant, in passing over the level near Bain's Vlei the car suddenly picked up and began to develop power without any apparent cause; a phenomenon which he not unreasonably attributes to the fact that the set pin was out and the bush loose, with the result that sometimes the unworn or less worn part of the bush was underneath, whereby the wheels were thrown more into mesh and the car for the time being seemed to be working better. This would also account for the fact that the car, upon the occasion of going round Naval Hill, though it had found a difficulty in negotiating the rise behind the late Mr. Oldfield's house, apparently found no difficulty in mounting the longer incline from the donga to the top of the nek on the medium gear. Similar remarks might be made with respect to the subsequent trials of the car and its behaviour on the trip to Dewetsdorp.

until we come to the day on which defendant dug a pit under the car and discovered the worn state of the bush.

In order to meet this view of the case deduced from the observed facts and probabilities, the plaintiff has given his own evidence and has called Sheppy to prove that on Sunday immediately preceding the sale, the 18th December, they took the gear box to pieces and cleared the bush and wheels of all grease and had an opportunity of examining these parts of the machine in detail. Now we must remember that this examination was made merely with the object of cleaning the machine and not with the object of finding defects, and yet, whilst plaintiff thought the gear in a very good state, Sheppy could only be got to say that the bush was the slightest thing slack, and that the middle spur wheel was not anything like what it is now. With respect to the plaintiff's own evidence, it is enough to say that a man who could travel 2000 miles without once having his bearings seen to is not likely to be a very good judge as to the state of his gear, and that if Sheppy's attention had been specially called to the state of the gear he would no doubt have found it in a much worse condition than he now thinks it was. The conclusion we have come to is that the gear box was at the date of the sale practically in the same state in which it is now, and that, even if it were in a somewhat better condition, it was in such an advanced state of wear that it was bound thereafter to deteriorate very rapidly and lead to the complete ruin of the car before very long.

To meet this possible finding of the Court the plaintiff has set up the case that the defendant is debarred from now relying upon the redhibitory defence (1) because with a full knowledge of the defects he paid the purchase price on the 29th December, and (2) because on the 23rd January, and after he knew of the state of the gear box, bush and wheels, he had the small pinion wheel replaced by a new one, and that each of these acts amounted to an acceptance of the car with all defects. Now with respect to the first of these points it is clear that where a purchaser has deliberately and without protest paid the purchase price, when he had full knowledge of all defects, he will lose not only his redhibitory action but also his *actio quanti minoris*; see Voet

(21, 1, 11); *Theron v. Africa* (10 S.C. 246). In the present case we are perfectly clear and are agreed that the defendant was not aware of the real defects under which the car was labouring at the time of the payment of the £45 and the giving of the promissory note, and that such defects as he did notice were explained away by plaintiff.

With regard to acceptance generally, as a ground of defence to the *actio redhibitoria*, it may be laid down that the deliberate acceptance of the thing sold with full knowledge of the defect complained of or of a breach of warranty will be a bar to the *actio redhibitoria*; see *Theron v. Africa* (10 S.C. 246); *Mostert v. Noah* (3 S.C. 174); Voet (21, 1 11); though it will not necessarily deprive the purchaser of the right to sue for a reduction of the purchase price by the *actio quanti minoris*, if he can show that by reason of the defect the thing was at the date of the delivery worth less than the price paid by him; see *Mostert v. Noah* (3 S.C. 174). Mere physical receipt of the things, however, will not necessarily amount to such an acceptance as to debar a purchaser from disputing the quality of the goods and rescinding the contract, unless the purchaser at the same time had full knowledge of the defects complained of by him. Acceptance, for instance, will not bind the purchaser where he had no opportunity of examining the thing before receiving it and upon subsequent examination finds out that it does not answer to the description or sample; see *Bouwer v. Ferguson* (4 E.D.C. 93). Acceptance will not even be a defence, though the purchaser may have killed one or more of a large number of animals purchased, when it is clearly proved that at the time of the sale the animals were suffering from a latent disease, of which the purchaser was unaware, both then and at the time of the delivery; see *Pringle v. Ellis & Son* (12 E.D.C. 111); especially where the presence of the disease could only be discovered by such killing, and the killing was done in the ordinary course of a butcher's business, for which, to the knowledge of the vendor, the animals had been bought (*Theron v. Africa*, 10 S.C. 246). In such a case the purchaser may return the balance of the animals left over, paying for such as have been killed. In the same way where goods sold were delivered to the carrier of the purchaser

at the place agreed upon for delivery, which happened to be the terminus of a railway, from which the goods had to be conveyed by road to the place of business of the purchaser, such delivery and conveyance have been held to be no conclusive evidence of acceptance, where the rest of the evidence clearly showed that the purchaser did not accept or intend to accept; see *Greenshields v. Chisholm* (3 S.C. 220). Again, where a purchaser, in the first instance, refused to accept an article as not being of the description of the article sold, but upon the assurance of the seller that it was so, did accept it, but afterwards found that it was of an inferior description, it was held that he was entitled to repudiate the sale, or at any rate insist upon a reduction of the price (*Waters & Herron v. Phillips & King*, 2 Menzies, 99). So also as regards quantity it has been decided that mere acceptance and payment of the purchase price upon delivery in terms of the contract will not deprive the purchaser of the right to ascertain afterwards whether the quantity delivered was correct, and upon finding that it was not, to recover a proportionate share of the purchase price (*Brown v. van Niekerk*, 2 Searle, 302). A purchaser, however, who having received delivery, wishes to repudiate the sale on the grounds of a defect in the things must do so within a reasonable time (*Meintjes and Dixon v. Deare and Dietz*, 2 Searle, 294; *Bell v. Kamp*, 15 E.D.C. 64). What is such a reasonable time will depend upon the circumstances of each case.

In the present case we are of opinion that, as there was a warranty of the car, the purchaser (the defendant) was not bound to examine it at the time of the sale, nor was he bound to take it to pieces immediately after the sale, but was justified in relying upon the warranty and concluding that the car was in good working order, and therefore in setting about using it as such. This he would have been entitled to do even if he had had no further assurances from plaintiff that the car was alright. It is clear, however, that he had such assurances from almost immediately after the sale. Thus, when the engine did not seem to be developing power during the first drive round Naval Hill, defendant was told that this was due to a bad petrol supply, as the plaintiff states, or to old petrol, according to the defendant's

version. As to what happened on the 29th December, when defendant returned from Weltervreden, there is a conflict of evidence between the plaintiff and defendant. The defendant states that he complained to plaintiff of the heating of the engines and of the lack of power, even though he had been using new oil, and that the plaintiff stated that the carburettor was not properly set, and thereupon did something to the carburettor which he said would fix it up and make it alright. This is denied by plaintiff, but then he denies also that any complaint was made by defendant, notwithstanding all the trouble he had with the car, a statement which we are not prepared to accept. We are of opinion that complaints were made by defendant, and that plaintiff gave some explanation which satisfied defendant for the time being, and we are confirmed in this view by the fact that plaintiff admits that on the 7th January the defendant asked him to come and see what was wrong with the car, and that on that occasion he readjusted the carburettor jet slightly. In addition to this the plaintiff was aware of the defendant's intention to go to Dewetsdorp, and allowed him to set out notwithstanding the trouble which had been experienced with the car before this, and without any warning that the trip was beyond the capacity of the car. Up to this time, therefore, we are of opinion that the defendant was acting within his rights in using the car without first having it overhauled and put in order.

On the 23rd January, however, the plaintiff alleges that the defendant performed certain acts which cannot be construed otherwise than as an acceptance of the car with all faults, subject to any claim he might have to reduction of the price by the *actio quanti minoris*. On that date, at any rate, it is alleged that he knew or must have known of the defective state of the gear box, and that he then gave an order to have a new pinion wheel put in in place of the original one, and that this amounted to an acceptance. Upon this part of the case we are of opinion that plaintiff is right in his contention, that in having a new pinion wheel put in the defendant was doing an act which he was not entitled to do except upon the supposition that he intended keeping the machine.

The very object of the redhibitory action is to put each party back into his original position before the sale, that the purchaser shall restore the thing in its original condition and the seller the price, and consequently the purchaser cannot repudiate the sale unless he is prepared to restore the thing as it was before the sale, reasonable wear and tear alone excepted. In the present case the defendant wishes to restore the car in a state different from what it was before the sale, namely, with a new pinion wheel, and this we are of opinion he is not entitled to do. We are further of opinion that when defendant sent the car to Hale's shop, on the 23rd January, to have a new pinion wheel put in, he was aware of the state in which the pinion wheel was which was to be replaced by the new wheel, that is to say, in equally bad if not worse condition to what the middle spur wheel is now, and he was also aware of the state of the bush, which was practically the same as that in which it is now. This being so, he was aware of two defects in the gear box, for either of which singly he would have been entitled to repudiate the contract. Instead of doing so he had one of these defects removed by having the new pinion wheel put in; in other words, he accepts the defect. In addition to this we are of opinion that, having discovered the defective condition of the bush and small pinion wheel, the defendant was put upon his examination, and it was his duty, before having any repairs made, to have examined the whole of the gear box and to have the whole car overhauled and to make up his mind once and for all whether he would repudiate the contract or not. Instead of doing so he had the small pinion wheel replaced by a new one, at a time when he knew or when it was his duty to have known of the state of the rest of the gear wheels, and must be taken to have accepted the car subject to all defects.

This being so the defendant is now debarred from raising the redhibitory defence; he is obliged to keep the machine, but will not be prevented from claiming that the purchase price be diminished, in so far as the car was at the time of the sale, and, owing to latent defects, of less value than it was represented to be. It was represented that the car was in fair and reasonable working order and condition for a second-hand car. As a matter

of fact it was not, but was in a bad state of disrepair, owing to the plaintiff's neglect to have his bearings attended to from time to time, as every careful owner of a car would naturally have done and would have been expected by any intending purchaser to have done.

Judgment must therefore be for the plaintiff, subject to such deduction on account of the reduced value of the car at the time of sale, as the parties may have agreed upon.

FAWKES and WARD, J.J., concurred.

Judgment by consent for plaintiff for £33, 10s., with costs.

Plaintiff's Attorney: *J. P. van Zyl*; Defendant's Attorney:
W. D. E. Watkeys.



REX v. THOMPSON.

1905. November 24. MAASDORP, C.J., and FAWKES
and WARD, J.J.

Criminal procedure.—House-breaking.—Tent used as dwelling.—Permanent occupation.

Where T, with intent to steal, broke into a tent which was occupied as a dwelling, *Held*, that he was rightly convicted of house-breaking. The test is the permanency of the occupation.

The prisoner was tried at the November Criminal Sessions, before WARD, J., and a jury, on an indictment charging him with house-breaking with intent to steal, in that "he did wrongfully and unlawfully break and enter the tent there situate of John Murray and John Jefferson, there residing, with intent the goods there being to steal." There was no second count charging the accused with theft or attempt to commit theft or some other offence. The jury found the prisoner guilty and he was sentenced to twelve months' imprisonment with hard labour.

Acting under sec. 37 of Ordinance 4 of 1902, the presiding judge reserved for the opinion of the court of appeal in criminal cases the question whether breaking into a tent, which was the act charged in the indictment and proved by the evidence, could be considered house-breaking.

de Jager, for the prisoner, at the request of the Court: To constitute the crime of house-breaking, the structure broken into must be a permanent one and not a mere tent or booth; *Stephens' Digest of the Criminal Law* (5th ed., art. 341); *Stroud's Judicial Dictionary*, *sub voce Dwelling-house*.

Blaine, A.-G., for the Crown: House-breaking with intent to steal was a crime known in Roman-Dutch law; *Matthaeus, de Criminibus de vi bonorum raptorum*, cap. 1, sec. 1. The question

as to what constituted *domus* was treated of by Matthaeus (*de usu et jure municipali*, sec. 4), where he laid down that "the law is equally applicable in the case of a person who has been attacked in his country house or gardens attached to it, in which he happens to be living. For the question is not determined by the nature of the house but by the use to which it is put. And therefore the law not only protects the mansions of the rich and powerful but also the cabins of the poor. And there is a good deal of reason for the view that the law comprehends a case of violence perpetrated against a miller in his mill or against a sailor living in a boat. And in support of this the edict relating to thieves and vagabonds may be cited, which provides that breaking into a mill or boat shall be punished equally severely as breaking into a building. For reference is made not only to a house but generally to any place used as a place for containing things or persons."

MAASDORP, C.J.: The question we have to decide is whether breaking into a tent occupied by persons constitutes the crime of house-breaking. According to Matthaeus the crime would be committed when a person breaks into a structure permanently occupied. The test appears to me to be the permanency of the occupation, the use to which the structure broken into is put. The same principle is involved in distinguishing between *praedium rusticum* and *praedium urbanum*, namely, the purpose for which either is used. In this case the structure is used for a dwelling-house, and the sentence and conviction must be upheld.

FAWKES, J.: I concur.

WARD, J.: The question we have to answer is, so far as I am aware, raised for the first time in South Africa, and on account of its importance, so many persons in this country being obliged from the nature of their occupations or for other causes to make their abodes in tents, I thought it eminently desirable to have a ruling of the court of appeal on the point. Now, if I were administering English criminal law, I would have no doubt as to the insufficiency of the indictment we are now dealing with.

Mr. *de Jager* has quoted to us the accepted English authorities on this branch of the criminal law. In addition to those he has brought to our notice, I would only refer to one of the latest and one of the best text-books on English criminal law, I mean Kenny's *Outlines of the Criminal Law*. At page 171, dealing with burglary and house-breaking, he says: "Much technicality has arisen in determining what buildings are to be regarded as houses. . . . Clearly a house must be something more than a mere tent or booth, it must be a permanent structure." It is quite clear, therefore, that if we are to adopt technical definitions of the English law the indictment before us discloses no offence, and it would have been my duty to have so ruled at the trial. I had, however, in my mind the second passage quoted from *Matthæus* by the Attorney-General, and reserved the point.

I agree with the CHIEF JUSTICE and my brother FAWKES that the conviction should be upheld.



WIESE, N.O., v. EXECUTORS OF WIESE.

1905. December 4. MAASDORP, C.J., and FAWKES
and WARD, J.J.

Donation.—Registration.

A donation *inter vivos* exceeding £500 in value and which is accepted by the donee is valid as between the parties although not registered (*Potgieter v. Groenewald, supra*, p. 101, followed).

Seemle, the registration of donations over £500 in value is unnecessary, even as regards creditors, where there has been transfer of the immovables or an open and *bona fide* delivery of the movables, the subject of the gifts.

Petrus Benjamin Wiese, in his capacity as father and natural guardian of certain four minors, brought an action against Tobias Benjamin Wiese, Hendrik Jacobus Rust Wiese and Hermanus Arnoldus Wiese, in their capacity as executors testamentary in the estate of the late Hester Maria Wiese and surviving husband, Tobias Benjamin Wiese (the first defendant), wherein plaintiff claimed that the liquidation and distribution account in the estate be so amended that certain two items of £400 and £101, 12s., respectively, be struck out from the debit side of the account, and that amongst the assets of the estate be included the sum of £3500 due from the second defendant to the estate and that the account be amended accordingly.

By the mutual last will of the late Hester Maria Wiese and surviving spouse Tobias Benjamin Wiese, dated March, 1902, the joint estate of the testators was massed, leaving to the survivor merely the usufruct of the same; after deducting certain legacies, Hendrik Wiese (the second defendant) was instituted sole and universal heir to one-half of the joint estate, and plaintiff's children, together with five children of the second defendant, as sole and universal heirs to the other half. Tobias Benjamin Wiese and the heirs had accepted and adiated under the said

will. Plaintiff contended that in the liquidation and distribution account filed by the defendants there was wrongfully and unlawfully brought up amongst the liabilities an item of £400 alleged to be due to the second defendant as a gift, as also an item of 202 sheep (valued at £101, 12s.) equally divided between the second defendant and his children. Plaintiff also contended that the second defendant was indebted to the said estate in the sum of £3500, which sum had not been brought up in the account. Plaintiff had objected to the confirmation of the said account, and the objections were, by consent of parties, referred by the Master to the decision of the High Court.

Defendants pleaded that in or about the month of May, 1904, Tobias Benjamin Wiese and his deceased wife, in consideration of services rendered to them by their son Hendrik (the second defendant), made to the latter a free gift of £400, which was accepted by him, that they undertook and promised to pay the amount out of the first money to become due to them, and the said amount was so paid by Tobias Benjamin Wiese shortly after the death of his wife; the sheep had also been donated by the testators to the second defendant and his children, and were accepted by and delivered to them, the defendants being satisfied that the claim was *bond fide*.

Defendants denied that the second defendant was indebted to the joint estate in the sum of £3500, but said that up to May, 1904, he had been indebted to the first defendant in certain sums, the exact amount whereof they could no longer specify, but not approximating £3500; that he had passed various promissory notes for his indebtedness, but that at the instance and request of the late Hester Maria Wiese, and with concurrence and consent of the first defendant and in reward and consideration for services rendered to his said parents, the debt was cancelled and the promissory notes held in proof thereof were destroyed.

Plaintiff replied that even if the debt had been cancelled as alleged such cancellation was null and void for want of proper registration.

On the facts the Court came to the conclusion that there had been no valid donation of the £400 or of the sheep (valued at £101, 12s.); that the promissory notes were destroyed by the

late Mrs. Wiese with the consent of her husband and with the intention of releasing the second defendant from the debt represented by those notes, and that this was done in the presence of the second defendant, consequently the destruction amounted to a donation of a debt, and, considering the circumstances under which it was made, the second defendant must be taken to have accepted it. The question for the consideration of the Court remained, whether registration of the donation involved in the destruction of the notes was necessary.

Hertzog (with him *de Jager*), for plaintiff: The questions for the consideration of the Court are, Do remuneratory donations require registration? Does remission or renunciation or discharge from a debt require registration? And can a donor, in the case of the donation exceeding £500, vindicate if a specific object has been donated or can he recover the value only? See *Codex* (8, 53, 34, sec. 1); *Struvius* (*Jurisprudentia lib. 2, tit. 10, sec. 19*); *Utrechtsche Cons.* (vol. 3, cons. 75); *Gaill* (*Observations, lib. 2, observation 39*); *Savigny* (*System of Roman Law*, vol. 4, secs. 153, 155, 167); *Windscheid* (*Lehrbuch des Pandekten Rechts*, vol. 2, secs. 365, 367, 368); *Goudsmit* (*Pandekten Systeem*, vol. 1, part 4, sec. 69, *et seq.*); *Voet* (39, 5, 14, 17); *Barrett v. Executors of O'Neil* (Kotzé, 109); *Brink v. Exors. of van der Byl* (1 Menzies, 552); *Kersteman* (*Woordenboek Aanhangsel*, vol. 1, *sub voce Donatio*); *van As v. Nel and Nel's Executors* (13 S.C. 427).

A. Fischer (with him *P. U. Fischer*), for defendants, referred to Ordinance 28 of 1902, sec. 61; *Pothier* (*Obligations*, secs. 608, 609, 614); *Pothier* (*Digest*, 46, 4, 21, sec. 6, under heading *Effects of Acceptilation*); *Goudsmit* (*Pandekten Systeem*, vol. 2., sec. 66); *Huber* (*Hedendaagsche Rechtsgeleerdheid*, bk. 3, ch. 39); *van der Poel's Executors v. Malan* (15 S.C. 70); *Union Bank v. Beyers* (3 S.C. 89); *Melk, Executor of Burger v. David and Others* (3 Menzies, 468); *Gaill* (*Observations*, bk. 2, obs. 38); *Slabber's Trustee v. Neezer's Executor* (12 S.C. 168); *Davies v. Trustee of Minors of Brisley* (18 S.C. 407); *Burge* (vol. 2, p. 809); *Maasdorp* (*Institutes of Cape Law*, vol. 1, pp. 233, 234); *Burge* (vol. 1, p. 367).

Cur. adv. vult.

MAASDORP, C.J. : In this case the question of law as to the effect of the non-registration of the donation involved in the destruction by the late Hester Maria Wiese of the promissory notes signed by Hendrik Wiese remains over for decision. Upon this part of the case the Court found, as a matter of fact, that the promissory notes were destroyed by Mrs. Wiese with the consent of her husband and with the intention of releasing Hendrik from the debt represented by those notes, and that this was done in the presence of Hendrik. This being so we are of opinion that the destruction of the notes amounted to a donation of the debt, and that considering the circumstances under which it was made, the donation must be taken to have been accepted by Hendrik. The destruction of the notes, in fact, was equivalent to the delivery of the notes duly cancelled to Hendrik and amounted to the same thing, as if there had been a donation of specific movables of more than £500 in value, which had been duly completed by the delivery of the movables to the donee.

According to the authorities cited by Mr. *Hertzog* (to which may be added Mackeldy, *Systema Juris Romani*, s. 425) it would appear that under the Roman law a donation of over 500 *aurei* in value was absolutely void as regards the excess over 500 *aurei* unless it was registered, and that this want of registration might be taken advantage of not only by the creditors of the donor and other persons interested in his estate, but even by the donor himself. What is more, the donor might not only use the fact of non-registration as a defence to an action brought against him for a fulfilment of a promised donation, but might even, where he had completed a donation by transfer or delivery, sue for a return of the excess in value over 500 *aurei*.

Several other questions were incidentally discussed by Mr. *Hertzog* which, with the view the Court takes of the case, it is unnecessary to consider. Thus, it is unnecessary to say anything special with respect to the necessity of registration of remuneratory, as distinguished from ordinary donations, or of the necessity or otherwise of registering the renunciation of a debt.

On the main question a difference of opinion existed amongst Roman-Dutch jurists as to the necessity for the registration of over 500 *aurei*, Grotius (3, 2, 15) and van der Linden (*Institutes*,

p. 215) holding that registration was not necessary, whilst the majority of Dutch writers usually quoted in South African courts held the contrary. See Voet (39, 5, 18); van der Keessel (*Th.* 489); van Leeuwen (vol. 2, p. 239); van Leeuwen (*Cape C.F.* pt. 1, 2, 8, 5); Groenewegen (*de Leg. Abr., Inst.* 2, 7, 2); Huber (*Hed. Rechts.*, 3, 14, 12). The question has fortunately been set at rest as far as South Africa is concerned, the principle of such registration having been adopted in a number of decided cases. See *Thorpe's Executor v. Thorpe's Tutor* (4 S.C. 488); *van As v. Nel and Nel's Executors* (13 S.C. 427); *Trustees of Brink v. Meckau and Others* (1 Roscoe, 211), and the only questions remaining have reference merely to the limitations to be applied to that principle.

In approaching the consideration of this subject it is well to bear in mind that the whole object of our modern system of registration of titles to immovables, of mortgage debts and other incumbrances upon immovable property, and of antenuptial contracts, is the protection of creditors and of other persons interested in preventing a person, who is the ostensible owner of landed property, from trading upon the credit of such ownership whilst he has all the time clandestinely parted with or encumbered such ownership. As long, however, as this object is attained, registration is not further required, and consequently it is not essential as against a transferor himself. As between an intending transferor or his executors, on the one hand, and an intending transferee, on the other, there is nothing to prevent the transferor from divesting himself of all his rights of ownership without any solemn transfer having been effected (Voet, 18, 6, 6; 41, 1, 42). This rule was recognised by the Supreme Court of the Cape Colony in connection with the subject of donation in a case between the executors of a donor and certain donees of a piece of land (*Melk, Executor of Burger v. David and Others*, 3 Menzies, 468). In this case the question of the necessity of the registration of a donation of over £500 in value, as between the donor and donee, was not raised, apparently because the donation happened to be a remuneratory donation, which does not require registration. See *Brink and Others, Executors of van der Byl v. Meyer* (1 Menzies, 552); *Matthews v. Oosthuizen and Others*

(22 S.C. 31); Voet (39, 5, 17). An express decision on the point, however, was given by KOTZÉ, J., in the High Court of the Transvaal province in the case of *Barrett v. Executors of O'Neill* (Kotzé, 109), in which he laid down that a donor might be compelled to make transfer of land promised by him as a donation and which was valued at more than £500, though there had been no registration of such a donation. In the course of his judgment KOTZÉ, J., said: "I must accordingly hold that where the donation exceeds the value of 500 *aurei*, the want of registration invalidates so much of the donation as is in excess of this amount. When once a donation has been accepted the donee has a right of action against the donor to compel him to make tradition or to give transfer of the subject matter of the donation, even though there has been no registration." . . . "Although registration may be necessary to the validity of a donation above 500 *aurei*, and consequently an unregistered donation above this amount would not hold good as against the creditors of the donor; still, as between the donor and donee, once a donation has been definitely accepted the former can be compelled by action to make tradition of the gift to the donee." The law as here laid down was, I understand, adopted by this Court during my absence from the colony in the case of *Potgieter v. Groenewald*, decided on the 2nd September, 1905 (*supra*, p. 101), and it would seem to be in accordance with our modern ideas and customs. The only persons who are at the present day protected by the law against themselves and against the consequences of their own acts are minors, persons under curatorship and married women; and whatever may have been the reasons which influenced the Roman law-giver towards protecting persons of full age and understanding against the consequences of making immoderate donations to their own prejudice, such reasons no longer prevail at the present day, perhaps, because, as Grotius suggests (3, 2, 15), excessive liberality is not so common amongst us as it apparently was amongst the Romans. Although, therefore, it is unnecessary to decide this specific point in the present case, I am quite prepared to accept the proposition that, as between a donee on the one hand, and a donor on the other, there is no necessity for the registration of a donation of over £500 in value.

In the present case, however, the question has been raised not as between a donor and donee, but between the survivor of two joint donors, and a person who, it is alleged, has, through the adiation of the estate of the first dying donor by the survivor, been placed in a contractual relationship to such survivor. It is difficult to see how such a contractual relationship can possibly exist. The donation involved in the destruction of the notes in question, though a joint donation of £2000, consists, as a matter of fact, of two distinct donations of £1000. As regards the late Hester Maria Wiese's share in the gift, the minors, represented by the plaintiff, would not have been entitled to dispute it, even if there had been no delivery of the amount donated, inasmuch as they are not creditors in her estate, and besides this her estate is perfectly solvent. In the same way the minors are not creditors to the survivor, whose estate is also perfectly solvent. They may stand in some contractual relationship to the survivor, obliging the latter to carry out the terms of the mutual will, but, as long as he does so, they have no further claim upon him, and as regards his donation to Hendrik of £1000 they are in exactly the same position as they would have been if no will had ever been made. They are not therefore entitled to dispute his portion of the donation any more than that of the first dying donor.

This being the view of the Court it is unnecessary for us to decide the further question which might have arisen if the decision of the Court on this part of the case had been different, namely, whether even the creditors of a donor are entitled to dispute a donation of over £500 made by him at a time when he was perfectly solvent, and which was at the time of the gift completed by delivery or transfer. As already pointed out, the whole object of our modern law with respect to delivery and registration is the protection of creditors and to prevent their being misled as to the financial position of a debtor, by seeing him in possession of property which he has clandestinely disposed of. The same principle would apply with equal force to a gift of over £500. When the subject-matter of such gift has been delivered in an open and *bond fide* manner or has been transferred in the office of the Registrar of Deeds, creditors have only themselves to thank if they remain ignorant of the fact. In ad-

dition to this it must be remembered that the legislatures of all the South African colonies have made special and ample provisions to protect creditors in this respect. By section 83 of our Insolvency Ordinance, which corresponds to similar enactments in the Cape Colony, the Transvaal and Natal, it is enacted that "every alienation, transfer, gift, cession or delivery of any goods or effects, movable or immovable, made by any insolvent at the time when it shall be made to appear by proof that his liabilities fairly calculated, exceeded his assets, fairly valued, shall, unless the same shall have been made *bond fide* and upon just and valuable consideration, be null and void." The legislature, therefore, at a time when it had the subject of the protection of creditors against gifts made by debtors pointedly before it, came to the conclusion that at any rate in the case of gifts completed by transfer or delivery, the section quoted served as ample protection without reference to the amount of the gift. The Roman law, therefore, which required the registration of donations of over £500 in value may be regarded as having become obsolete in so far as it has reference to cases in which there has been transfer of immovables or delivery of movables. There are no South African decisions in cases in which gifts of movables were in question, but in the case of *Barrett v. Executors of O'Neil* (Kotzé, 109), already referred to, KOTZÉ, J., laid it down that as soon as transfer has been made *coram lege loci*, the donation may be valid even as against the donor's creditors, for transfer *coram lege loci* is equivalent to registration.

The same view has been held by the Supreme Court of the Cape Colony in a late case, *Davis v. Trustees of Minors Brisley and Others* (18 S.C. 407), in which it was decided that the donation of a farm of more than £500 in value, which had been transferred in the lifetime of the donor, could not be questioned by his widow to whom he had been married in community of property, though such donation might be questioned by her where the transfer had not yet taken place. In the course of his judgment, BUCHANAN, Acting C.J., stated: "The validity of a donation above £500 not completed by actual delivery depends on the due registration of the gift," and during the argument he expressed the opinion that "where there has been delivery regis-

tration is not necessary." This is entirely in accordance with the general principles of our law, which regards the delivery of movables as standing in exactly the same position as the registration of immovables, having the same object in view, namely, notice to creditors and the public generally; and if the case of *Davis v. Trustee of Brisley* was rightly decided, we are bound to hold that where a gift of movables has been completed by delivery, such gift will be valid even without registration. This will, however, leave the Roman law still in force for the protection of creditors as against donations in which there has been no transfer or delivery; see *Van As v. Nel's Executors* (13 S.C. 427). In the present case we are of opinion, as regards the gift of the promissory notes to Hendrik Wiese, there was what was equivalent to delivery and that the gift therefore is valid, although there was no registration of the same. The second prayer of the declaration is therefore refused.

The judgment of the Court will therefore be in favour of the plaintiff. That the liquidation account in the estate of the late Hester Maria Wiese be amended by striking out the items of £400 and £101, 12s., in accordance with the plaintiff's first prayer, and that corresponding amendments be made in the distribution account. Costs to come out of the estate.

FAWKES and WARD, J.J., concurred.

Plaintiff's Attorney: *J. W. G. Steyn*; Defendants' Attorneys: *Botha & Titley*.



CLAASSENS v. WILKENS.

1905. December 11. MAASDORP, C.J., and FAWKES
and WARD, J.J.

War.—Enemy property.—Appropriation.

A commanding officer who deals with enemy property in a way in which he would not have done unless he intended to appropriate it, must be presumed to have appropriated it. Such appropriation will also be presumed to be in accordance with the laws of war, unless the contrary be proved.

WARD, J., dissented.

This was an appeal from a decision of the Assistant Resident Magistrate at Ficksburg.

The appellant brought an action in the magistrate's court for the recovery of a certain cow. Respondent pleaded that he was the lawful owner and that he had bartered the cow in question from the proper military authorities through their lawfully appointed agent during the late war.

At the outbreak of the late war between the Republics and Great Britain the appellant was owner, amongst others, of the cow in question. It appears that he went on commando for a while and then returned to his farm, from which he was removed by the British and taken to Harrismith, where he took the oath of neutrality. His cattle were left on his farm. These cattle were taken by the military from the farm during the war, but there was no actual fighting on the farm the day the cattle were removed. The cattle were taken to Basutoland and handed over to one Stevens, who bartered cattle for horses and also bought horses for the British military authorities during the war. One, Saunders, acting for Stevens, exchanged four head of cattle, including the cow in question to defendant for a horse, the property of defendant.

The magistrate gave judgment for respondent (then defendant) with costs. From that judgment the appellant now came in appeal.

Hertzog, for appellant, quoted *Smit v. Bester* ([1904] O.R.C. 30).

A. Fischer, for respondent, quoted Halleck (vol. 2, ch. 35, secs. 4 and 7); *Watson v. Bradley*, decided by the Supreme Court of the Cape of Good Hope in 1903.

MAASDORP, C.J.: It is rather a pity that cases of so much importance as the present one should only be brought before this Court by way of appeal, because evidence of importance is sometimes omitted and evidence is also taken, the full importance of which is not understood at the time. In the present case we must take for granted if in war the commanding officer or his representative deals with enemy property in a manner in which he would not deal with it unless he meant to appropriate it, that he did so appropriate it, and we must presume that the method of appropriation is in one of the legally recognised forms, *e.g.*, requisition or capture, unless the contrary be proved. It would be absolutely impossible to carry on war-like operations if the onus of proof were cast on the military to account for every individual head of cattle that came into their possession.

In this case fighting had taken place in the neighbourhood of the farm from which the cattle were removed on the day in question, and the cattle, having been taken, were removed to Basutoland and finally handed over to Stevens, with instructions how to deal with them, who, we must presume, acted on those instructions. In so doing he exchanged the cow in question for a horse, to be used for military purposes. Stevens was, in fact, acting in a position of or on behalf of a commanding officer, and in that capacity treated the cow as having been converted into British property. The Court is not exactly agreed on this point, but the majority hold this. With regard to the case of *Smit v. Bester* ([1904] O.R.C. 30), I would like to point out that the Court distinctly held in that case that there had been no capture, but that the cattle had been brought in to preserve them.

FAWKES, J.: I concur with the CHIEF JUSTICE.

WARD, J. (dissenting): The cattle were taken under circum-

stances not stated. They were used not for war but in exchange for animals that could be used for war purposes. It is unnecessary to go into the circumstances under which private property may be captured, but the military must show that the property was not captured in contradiction of recognised rules of international law. Here, owing to the general sweeping orders, this proof becomes more difficult than usual, and there would be confiscation as soon as the military had taken the cattle into their possession. But if we look at the proclamations issued at the time we find that only duly authorised supply officers may requisition, so that private property had to be respected, and where it was taken the Court must not presume that it was taken with the intention to confiscate it; see *Achterberg v. Glinister* ([1903] T.S. 326) and *Smit v. Bester* ([1904] O.R.C. 30), from which I cannot distinguish this case.

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3/1/04



